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ABSTRACT

Judicial decisions affecting educational policy and management that were handed down in 1991 by state and federal courts are summarized and analyzed in this book. The analyses are divided into eight topical chapters: (1) "Employees" (Ralph D. Mawdsley); (2) "Bargaining" (Charles J. Russo); (3) "Pupils" (Henry S. Lufler, Jr.); (4) "Individuals with Disabilities" (Allan G. Osborne, Jr.); (5) "Torts" (William J. Evans, Jr.); (6) "Sports" (Linda A. Sharp); (7) "Finance" (Bettye MacPhail-Wilcox and Patricia Anthony); and (8) "Higher Education" (Robert M. Hendrickson). (MLF)

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THE NEW BOOK OF
EDUCATION LAW 1992

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**THE YEARBOOK
OF
EDUCATION LAW
1992**

Edited by

STEPHEN B. THOMAS

KENT STATE UNIVERSITY

**NATIONAL ORGANIZATION ON
LEGAL PROBLEMS OF EDUCATION
TOPEKA, KANSAS**

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Dr. Thomas would like to express his appreciation to Carol Denzinger and Burt Willeford for their assistance in the preparation of this text. Both currently serve as research assistants in the Educational Administration Program at Kent State University.

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Introduction

This chapter covers over 210 cases in 1991 involving precollegiate, public-sector employees. The review excludes those cases analyzed in other sections of the *Yearbook* (e.g., higher education, torts, collective bargaining). Those cases where procedural issues are involved are also omitted, and procedural issues in the remaining cases are deemphasized. As last year, 1991 saw no Supreme Court cases related to school employment; however, where Supreme Court cases from prior years are necessary for an understanding of current cases, they are mentioned. Similar to past years the section on dismissal, nonrenewal, demotion, and discipline contains the largest number of cases, with many revolving around the issue of board compliance with district and state policies.

Discrimination in Employment

Discrimination claims can be based on a number of federal statutes, the most prominent of which is title VII of the Civil Rights Act of 1964.¹ Title VII prohibits both public and private institutions from discriminating on the basis of race, color, religion, sex, and national origin. Additionally, gender-based discrimination is prohibited by title IX of the Education Amendments of 1972² and gender-based wage discrimination is prohibited by the Equal Pay Act of 1963.³ Discrimination against employees forty or older is prohibited by the Age Discrimination in Employment Act of 1973 (ADEA)⁴ and discrimination against "otherwise qualified handicapped individuals" is prohibited under section 504 of the Rehabilitation Act of 1973.⁵ Discrimination based on national origin and race is prohibited by section 1981 of the Civil Rights Act of 1866.⁶ Discrimination complaints may also be pursued under section 1983 of the Civil Rights Act of 1871 which protects both constitutional and statutory rights.⁷

Civil rights complaints rely on fact situations that indicate statutory violations. Several school district policies were found to present genuine issues of material fact regarding possible violations of the Pregnancy Discrimination Act. One policy concerned whether pregnant and nonpregnant teachers were treated similarly in their ability to combine various kinds of leave, particularly whether pregnant teachers who had opted for paid medical leave were eligible for parental leave. A second policy in dispute concerned whether sick leave bank days could be used by pregnant teachers

1. 42 U.S.C. § 2000 *et seq.*

2. 20 U.S.C. § 1681 *et seq.*

3. 29 U.S.C. § 206 (d)(1).

4. 42 U.S.C. § 1601 *et seq.*

5. 20 U.S.C. § 794 *et seq.*

6. 42 U.S.C. § 1981.

7. 42 U.S.C. § 1983.

if the teachers were not considered disabled. Regarding the first policy the trial court found on remand that permitting teachers to take sick leave in conjunction with any leave other than maternity leave did not violate title VII. However, the sick bank provision, by automatically excluding maternity benefits, was found to discriminate against pregnant teachers who elected to utilize accumulated sick leave for their pregnancy-related disability.⁸ In a case of some importance in education suggesting that a new category, "sexual orientation," may need to be added to the list of protected constitutional rights, a Kansas federal district court held that the plaintiff, allegedly not hired for a high school teaching/coaching position because of "homosexual tendencies," had a section 1983 cause of action under the Fourteenth Amendment. Comparing sexual orientation to race or gender, the court applied a test of "immutability" and concluded that "to discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals." The court went on to find that there was no rational basis for discriminating on the basis of homosexual orientation in teaching in public schools and that the school principal who had refused to hire the plaintiff was not entitled to a qualified immunity defense where the "discrimination . . . [was] purely arbitrary and without any rational basis."⁹

Any discrimination claims under state law must fall within the parameters of the statute. In filling a position for assistant principal in West Virginia, a principal did not improperly use subjective factors in violation of a West Virginia statute requiring job qualifications to be the primary factor in filling teaching positions. That statute was applicable only to teachers, as opposed to administrators, and therefore hiring a male physical education teacher rather than the female plaintiff who was employed in the central office was not an abuse of discretion considering the need for someone with demonstrated experience to work with a socially diverse student body.¹⁰

Race

Plaintiffs were generally not successful in stating civil rights claims based on race. In one successful case the Eleventh Circuit Court of Appeals held that nonrenewal of a black teacher's contract because she did not hold a state teacher's certificate was a pretextual defense to a title VII complaint. The state's certification procedure had been invalidated and was on appeal in a class action suit and the school board had successfully petitioned the state

8. *United States v. Board of Educ. of Consol. High Sch. Dist. 230, Palo Hills, Ill.*, 761 F. Supp. 519, 524 (N.D. Ill. 1990).

9. *Jantz v. Muci*, 759 F. Supp. 1543, 1548, 1552 (D. Kan. 1991).

10. *Pockl v. Ohio County Bd. of Educ.*, 406 S.E.2d 687 (W. Va. 1991).

for three separate temporary certificates for other teachers.¹¹ In a case interpreting the recent Supreme Court case of *Patterson v. McLean Credit Union*,¹² which held that racial harassment after the formation of a contract is not actionable under section 1981, the district court held that section 1981 applied to the discriminatory termination of the contract of a black teacher.¹³

However, in another case interpreting *Patterson* a federal appeals court upheld a summary judgment for a school district against a claim by a nonrenewed black teacher that she had been discharged in violation of section 1981. The appeals court concluded that "claims of discriminatory discharge are no longer cognizable under section 1981 because discharge does not involve contract formation."¹⁴ In still another case interpreting *Patterson*, a black female employee, who alleged continued harassment following reinstatement after filing an EEO complaint, failed to state a cause of action under section 1981. The federal district court deciding this case observed that plaintiff might have stated a successful section 1981 cause of action had she been offered a new position amounting to a promotion upon reinstatement so as to present "plaintiff an opportunity to enter a new and distinct employer/employee contractual relationship."¹⁵

In other cases employees were unsuccessful on the basis of race. A school district was entitled to summary judgment against a nonrenewed black teacher who had been nonrenewed, where three other teachers who had been nonrenewed were white, and where the principal evaluating the black teacher was also black. The plaintiff was not able to produce evidence that the school district's reasons for nonrenewing her were pretextual rather than due to incidences of lack of cooperation, hostility and insubordination toward school administrators.¹⁶ A black school bus driver, who had solicited sex from a white student and who was suspended with pay for the balance of the school year, failed to state a section 1983 claim when his contract was not renewed for the subsequent year because his unsupported assertion that two white employees had not been nonrenewed for similar conduct failed to refute the school district's evidence that it had acted in good faith.¹⁷ A black cosmetology teacher who had been discharged because of numerous parent complaints, lack of effective classroom discipline, failure to use effective teaching methods, and refusal to obey supervisory directives failed to state a *prima facie* case under title VII when she failed to meet her burden of demonstrating by a preponderance of the evidence that "others not in the protected class were treated more favorably."¹⁸

11. *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240 (11th Cir. 1991).

12. 491 U.S. 164 (1989).

13. *Ginwright v. Unified Sch. Dist. No. 457*, 756 F. Supp. 1458 (D. Kan. 1991).

14. *Hull v. Cuyahoga Valley Joint Voc. Sch. Dist. Bd. of Educ.*, 926 F.2d 505 (6th Cir. 1991).

15. *Smith v. Denver Pub. Sch. Bd.*, 758 F. Supp. 1421 (D. Colo. 1991).

16. *Sommerville v. Tuscaloosa City Bd. of Educ.*, 579 So. 2d 628 (Ala. Civ. App. 1991).

17. *Williams v. Conroe Indep. Sch. Dist.*, 809 S.W. 2d 954 (Tex. Civ. App. 1991).

18. *Mack v. Kent County Vocational and Technical Sch. Dist.*, 757 F. Supp. 364, 378 (D. Del. 1991).

School districts prevailed in a variety of nondischarge cases. A school district's reason for promoting a white male over a black male to a position of administrative assistant for secondary schools was upheld as nondiscriminatory and not pretextual. The selected candidate had previously presided over the merger of two high schools while the new administrative assistant would have to preside over a similar merger. "The court cannot use civil rights statutes like title VII as a means of second-guessing a business decision."¹⁹ In a disparate treatment case where two black female applicants for the position of Supervisor of Elementary Education had not been hired in favor of a white female, the two black applicants failed to prove by a preponderance of the evidence that the school district's proffered reason for hiring the white applicant (superior education and work experience) "was not the true reason for the employment decision."²⁰ In another case, a black tenured teacher failed to prove title VII discriminatory treatment, impact, or retaliation. Statistical evidence of some disparity in the placement of black teachers based on their performance appraisal as compared to some white teachers was not admissible because it was not based on personal knowledge. Furthermore, the school board lacked discriminatory motives since it had adopted the findings of an administrative judge.²¹ In another case brought by a black employee, a federal district court decided that job progression and minimum experience requirements did not perpetuate past discrimination, and even if they did, the defendant was able to prove that the requirements were necessary for the efficient operation of the department.²² As a matter of law, a federal district court determined that the Texas Examination for Current Administrators and Teachers (TECAT) did not have a disparate impact on blacks where the passing rate of blacks exceeded four-fifths that of whites.²³ A black male who had applied unsuccessfully for fourteen different positions at Harvard University was time-barred in his civil rights suit against the university because he waited until January 1989 to file his action after having been furnished his EEOC right-to-sue letter in September 1983.²⁴

A charge of race discrimination is possible among members of the same race. In an Arkansas case, a black teacher hired to fill a vacant elementary position for which another black applicant had not been hired did not preclude a race discrimination charge. However, in this case, the plaintiff nonhired teacher lost because the school district's reason that the plaintiff was out of town during the interview period and the district reasonably

19. *Senigar v. Beaumont Indep. Sch. Dist.*, 760 F. Supp. 1200 (E.D. Tex. 1991).

20. *Weber v. Port Arthur Sch. Bd.*, 759 F. Supp. 341, 343 (E.D. Tex. 1991) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

21. *Smith v. Denver Pub. Sch. Bd.*, 767 F. Supp. 226 (D. Colo. 1991).

22. *Davis v. Alabama Dep't of Educ.*, Dep't of Disability Determination Servs., 768 F. Supp. 1471 (N.D. Ala. 1991).

23. *Fields v. Texas Cent. Educ. Agency*, 754 F. Supp. 530 (E.D. Tex. 1989).

24. *Johnson v. Rodriguez*, 943 F.2d 104 (1st Cir. 1991).

thought that the plaintiff was no longer interested in the position was not pretextual.²⁵

Religion

Only one case was reported in this section. A private corporation which provided auxiliary services to nonpublic school students under contract with the Philadelphia School District discriminated against an applicant not hired on the basis of religion because a two-toned green scarf tied to the side of applicant's head and worn as a Muslim was the basis for the nonhire. The court found that there was nothing facially religious or likely to be perceived as religious by students concerning the scarf so as to constitute "religious garb" under a Pennsylvania Department of Education standard proscribing religious garb. Plaintiff was entitled under title VII to back pay.²⁶

Sex

Courts were split regarding the success of sex discrimination complaints. In an interesting state case, statements by search committee members during the selection process for a school superintendent to the effect that "we don't want a woman in that position" and "what we need is a big, strong man with a big, strong voice who can come to the committee and fight" were admissible under the parol evidence rule to demonstrate sex discrimination.²⁷ In a case brought under the Pregnancy Discrimination Act, female teachers were unsuccessful in arguing disparate impact regarding the number of sick days pregnant teachers needed to accumulate compared to male teachers and female teachers who elected to forego childbirth. Statistical evidence, standing alone, on the number of sick days female teachers had accumulated over their teaching careers was insufficient to establish that school district policies had disproportionate impact on female teachers who experienced pregnancy-related disability.²⁸

In an case involving a sex and race discrimination complaint by a Caucasian female alleging that she was paid less for the same work performed by a Native American male, the Montana Supreme Court decided that establishing a *prima facie* case is sufficient to prevent awarding attorney fees to the prevailing school district on the grounds that the action was frivolous.²⁹

25. *Sherpell v. Humnake Sch. Dist. No. 5 of Lonoke County*, 750 F. Supp. 971 (E.D. Ark. 1990).

26. *EEOC v. Reads, Inc.*, 759 F. Supp. 1150 (E.D. Pa. 1991).

27. *Northeast Metro. Regional Vocational Sch. Dist. Comm. v. Massachusetts Comm'n Against Discrimination*, 575 N.E.2d 77 (Mass. App. Ct. 1991).

28. *Maganuco v. Leyden Community High Sch. Dist.*, 212, 939 F.2d 440 (7th Cir. 1991).

29. *McCann v. Trustees, Dodson Sch. Dist.*, 816 P.2d 435 (Mont. 1991).

In a case arising under the Equal Pay Act, a federal appeals court determined that a new salary schedule that reduced the number of pay levels did not constitute a seniority system as a defense to a title VII gender discrimination complaint where the new salary schedule perpetuated discrepancies under the old schedule which were unrelated to seniority or longevity. Although the trial court had wrongly determined that the pay schedule was a seniority system, there was no evidence of intentional discrimination to establish disparate treatment. The appeals court remanded the case to determine whether the differences in wages violated the Equal Pay Act.³⁰

National Origin

Courts split in the two reported cases. An Hispanic applicant for an assistant principal position who was rejected for the position by a school board in favor of a black applicant stated a triable cause of action under both section 1983 and the Fourteenth Amendment for national origin discrimination when she alleged sufficient facts in her complaint so that the reasons proffered by the school board were considered to be pretextual. Some of the alleged facts were that various board members had not read the Hispanic applicant's resume, had not listened to a taped interview of the applicant, or had not asked the same key questions of both applicants.³¹ On the other hand, an Hispanic employee was not discriminated against on national origin grounds when the National Education Association did not rehire him for a new managerial position after his position had been abolished where he was not qualified for the new position and the new position was intended to be filled by an existing employee.³²

Age

School districts successfully defended age discrimination charges. A school district successfully articulated nondiscriminatory reasons for not hiring a fifty-four year old applicant for English or Library Science by producing evidence that: (1) 41% of the jobs were filled by persons over forty; (2) plaintiff had some unfavorable evaluations in his file from part-time teaching assignments in the district; (3) plaintiff's interviews with principals were unimpressive; and (4) for each job opening there was a pool of over 2,000 applicants.³³ In another case, a nonrenewed superintendent's claim of age discrimination was rebutted by the school district's claims that

30. *Mitchell v. Jefferson County Bd. of Educ.*, 936 F.2d 539 (11th Cir. 1991).

31. *Rosario-Olmedo v. Community Sch. Bd. for Dist. 17*, 756 F. Supp. 95 (E.D.N.Y. 1991).

32. *Fuentes v. National Educ. Ass'n*, 752 F. Supp. 487 (D.D.C. 1989).

33. *Wooden v. Board of Educ. of Jefferson County, Ky.*, 931 F.2d 376 (6th Cir. 1991).

the superintendent had repeatedly failed to implement board directives, to timely present budget recommendations, or to present plans and procedures requested by the board.³⁴ A school employee who resigned in 1979 and filed an ADEA charge in 1986 failed to produce evidence of bad faith, deception, or false assurances on the part of the school district so as to warrant an equitable waiver of the two and three year statutes of limitations.³⁵

In a case interpreting the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*,³⁶ a federal district court decided that *Betts* should be applied retroactively to exclude an early retirement plan pursuant to a collective bargaining agreement from the purview of the ADEA. In this case, two employees, who were ineligible for the early retirement plan solely because they were older than the age eligibility period, had no ADEA cause of action since the plan was a fringe benefit that did not discriminate in any nonfringe benefit aspect of the employment relationship.³⁷

Handicap

School employees were unsuccessful in several handicap discrimination cases brought under both state and federal statutes. A teacher with multiple sclerosis who had taken disability leave with intent to return to teaching failed to state a cause of action under the Rehabilitation Act when she admitted that it was her understanding that if she returned to school she would be teaching full-time.³⁸ A visually impaired teacher failed to prove discrimination under Georgia law when she was fired after refusing to report to a newly assigned school twenty miles from home, whereas the prior assignment had been only one mile from home. The Georgia Court of Appeals relied on the following factors: the handicapped teacher had been treated no differently than nonhandicapped teachers; the teacher's contract permitted reassignments; the school district had offered two placements closer to her apartment than the twenty miles but not as close as the one mile; the teacher was unwilling to change apartments; and the teacher refused to consider taking public transportation.³⁹ In interpreting Missouri's handicap statute, the state appeals court determined that a teacher who suffered from epileptic-like seizures and who could not be reasonably accommodated because her job required her to move throughout a building with concrete steps, was not therefore a qualified handicapped person.⁴⁰

34. *Murray v. Mount Pleasant Indep. Sch. Dist.*, 754 F. Supp. 535 (E.D. Tex. 1990).

35. *Douchette v. Bethel Sch. Dist.* No. 403, 818 P.2d 1362 (Wash. 1991).

36. 492 U.S. 158 (1989).

37. *Cipriano v. Board of Educ. of City Sch. Dist. of N. Yonawanda, N.Y.*, 772 F. Supp. 1346 (W.D.N.Y. 1991).

38. *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 754 F. Supp. 570 (S.D. Ohio 1990).

39. *Allen v. Bergman*, 400 S.E.2d 347 (Ga. Ct. App. 1990).

40. *Umphries v. Jones*, 804 S.W.2d 38 (Mo. Ct. App. 1991).

A school district policy that required staff members who had AIDS to be placed on either sick leave or leave of absence was found to discriminate against the handicapped under the Wisconsin Fair Employment Act whether or not the disease was in remission. The policy was intended to be enforced in a blanket manner, and the school district was not able to bear the burden of proving its safety concerns on a case-by-case basis.⁴¹

The Fourth Circuit Court of Appeals remanded a case that may have significant implications for determining teacher qualifications. The district court was asked for factual findings regarding whether passing the NTE represented the essential function of the teaching job, whether the teacher at issue could perform the essential functions of her specific teaching position, and whether a test waiver was a reasonable accommodation that should have been accorded by the state. In this case, a teacher with three diagnosed learning disabilities, who failed the Communications Skills portion of the NTE on three occasions, was denied a waiver by the state superintendent, because this particular passage of the NTE was a requirement for teacher certification.⁴²

Substantive Constitutional Rights

Speech

Free speech cases involved issues such as public forum, immunity, and procedural matters. A terminated employee's anonymous letter to board members of a state girls' school resulted in an investigation of treatment of the girls and staff members and of management techniques, and addressed matters of public concern entitling the employee to free speech protection, but the employee's termination was permitted to stand because the substantial motivation for termination was the employee's insubordination.⁴³ In another case involving public concern, the Tenth Circuit Court of Appeals upheld four days administrative leave and placement of a letter of reprimand in a high school government teacher's file after he had repeated a rumor in class that two students had been making out on the tennis court the prior day. The appeals court agreed with the district court that a ninth grade government class is not a public forum and therefore a teacher's comments are teacher-sponsored for First Amendment purposes. The court identified three school interests justifying the disciplinary action: preventing a teacher's use of his position of authority to confirm an unsubstantiated rumor; ensuring that teacher employees exhibit professionalism and sound judgment; and provid-

41. *Racine Unified Sch. Dist. v. Labor and Indus. Review Comm'n*, 476 N.W.2d 707 (Wis. Ct. App. 1991).

42. *Pandazides v. Virginia Bd. of Educ.*, 946 F.2d 345 (4th Cir. 1991).

43. *Mekss v. Wyoming Girls' Sch.*, 813 P.2d 185 (Wyo. 1991).

ing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers.⁴⁴

In a case involving immunity, the acting school board chairperson, who had directed three police officers to remove another board member following a heated exchange concerning the hiring of seven teachers, was not entitled to an absolute immunity defense against the ejected board member's claim of violation of his free speech rights. The federal district court determined that where the school board discussed individuals, such an act was an administrative function for which absolute immunity did not apply, as opposed to a legislative function where general policy matters would be discussed.⁴⁵ In two cases decided on procedural grounds, a school board president had no section 1983 cause of action for comments made at a public meeting,⁴⁶ and nontenured teachers who had filed unfair labor practice charges with the State Employment Relations Board lost the right to file suit for alleged free speech violations.⁴⁷

Association

The cases in this section involve employee contacts with political parties or unions. In one of a continuing series of cases that has flowed from a change of political parties in the Puerto Rican election of 1984, an employee in the commonwealth's Department of Education who had been eligible for various positions beginning in 1985 for which she had applied but had never been interviewed, alleged political association discrimination under section 1983. A federal appeals court determined in this case that education officials in Puerto Rico were entitled to qualified immunity from section 1983 liability where the law at the time of the alleged discrimination was unclear as to whether the First Amendment barred politically motivated demotion of a career civil servant.⁴⁸ In two cases involving union associations courts ruled against the employees. In one of the cases, a teacher was not able to overcome a school district's evidence of good faith regarding a discharge where the teacher's only evidence was her own conclusory allegations of discrimination.⁴⁹ In the other case, the United States Court of Appeals for the Seventh Circuit ruled in a suit by an assistant principal for alleged retaliation after she had filed a grievance with her union that the "public concern" test under *Connick v. Myers*⁵⁰ applied also to cases involving freedom of association. However, in this case the court found that plaintiff's grievance regarding

44. *Miles v. Denver Pub. Schs.*, 944 F.2d 773 (10th Cir. 1991).

45. *Vacca v. Barletta*, 753 F. Supp. 400 (D. Mass. 1990).

46. *Jungherr v. San Francisco Unified Sch. Dist. Bd. of Educ.*, 923 F.2d 743 (9th Cir. 1991).

47. *Kingsbury v. Southeast Local Bd. of Educ.*, 568 N.E.2d 752 (Ohio Ct. App. 1989).

48. *Roque-Rodriguez v. Lema Moya*, 926 F.2d 103 (1st Cir. 1991).

49. *Peelman v. Delaware Joint Vocational Sch. Dist. Bd. of Educ.*, 763 F. Supp. 268 (S.D. Ohio 1991).

50. 461 U.S. 138 (1983).

reduction of her performance rating from superior to excellent was "a matter of purely private concern" and therefore not protected as a right of association.⁵¹

Substantive Due Process

Violations of substantive due process tend to occur when state actions are arbitrary, capricious, or unfair in substance, rather than lacking in procedural correctness, so as to deprive an employee of a fundamental right. A female basketball coach suspended from her coaching assignments pending an investigation of alleged complaints regarding her coaching conduct was not deprived of substantive due process because "the law does not recognize a fundamental right to coach basketball."⁵² Likewise, a certified teacher who failed to be promoted to various administrative positions had no substantive due process right in a promotion.⁵³ Substantive due process requires that a school board in a contract nonrenewal base its decision on competent, credible evidence and that requirement was satisfied in a South Dakota case where a board, after listening to three and one-half hours of conflicting testimony and deliberating for an hour, determined that the superintendent's testimony recommending nonrenewal was credible and competent.⁵⁴

A tenured high school teacher who alleged a pattern of harassment by her supervisor, including being berated in the presence of students and making repeated allegedly defamatory calls to the teacher's co-workers, had no cause of action under section 1983 for a substantive due process violation. The court noted that the teacher had not suffered loss of employment, benefits, or responsibilities and that the Supreme Court has never suggested that substantive constitutional safeguards accorded under the due process clause embraced all state-created interests entitled to procedural due process protection.⁵⁵

Procedural Due Process

Procedural due process focuses on the fairness of treatment to school employees, rather than fairness of the underlying rules which led to the judicial conflict. For example, a section 1983 claim that an employee had been constructively discharged because of harassment at work required proof by the employee that his discharge had been intentionally carried out

51. *Griffin v. Thomas*, 929 F.2d 1210, 1215 (7th Cir. 1991).

52. *Schneeweis v. Jacobs*, 771 F. Supp. 733, 738 (E.D. Va. 1991).

53. *Coyne v. City of Somerville*, 770 F. Supp. 740 (D. Mass. 1991).

54. *Nordhagen v. Hot Springs Sch. Dist.* #23-2, 474 N.W.2d 510 (S.D. 1991).

55. *Santiago De Castro v. Morales Medina*, 943 F.2d 129, 131 (1st Cir. 1991).

with the purpose of depriving him of his right to notice and a hearing.⁵⁶ In a divided court, the Colorado Supreme Court determined that a jury question was presented as to whether a teacher in a weakened mental condition was discharged without being offered due process of law when the principal presented the teacher with a predrafted resignation letter which the teacher signed.⁵⁷

Liberty and Property Interests

Constitutionally protected property rights focus on whether the employee had an entitlement for which certain procedures must be accorded the employee, whereas liberty rights focus on words or actions which may tend to stigmatize an employee. In a case involving fundamental contract concepts of offer and acceptance, a school bus driver notified two weeks prior to the start of school that he would not be hired as a school bus driver because of a DUI arrest earlier in the summer did not state a predictable property interest. A letter from the school district to the driver at the end of May with the words, "we are looking forward to your return to your position for the 1988/89 school year," constituted only an offer for a unilateral contract. Since the offer had been justifiably revoked prior to the employee's performance no contractual entitlement to employment had been created.⁵⁸ A tenured teacher placed on unpaid medical leave by her district received all of the due process to which she was entitled regarding her employment property interests when she was provided written notice of the proposal to place her on medical leave, an oral explanation of the reasons for the action, and a psychiatric examination.⁵⁹ A nontenured teacher who failed to gain tenure because her contract was not renewed for a fourth year had no legally recognized property right in a new contract, and thus was not entitled to constitutional due process with respect to nonrenewal.⁶⁰

A property right must be created other than in the Constitution. Under New Mexico statutes, a school principal who had a one-year contract, and who had been nonrenewed after one year, had "no legitimate expectation of reemployment" and therefore no property interest had been created subject to federal constitutional guarantees. In addition, because the principal had been reassigned as a teacher, the statutory termination procedures for principals did not apply.⁶¹

A tenured guidance counselor terminated for "immorality" after she had pleaded guilty to three misdemeanor counts of fraud, failed to state a section

56. *Doohan v. Bigfork Sch. Dist.*, No. 38, 805 P.2d 1354 (Mont. 1991).

57. *Boulder Valley Sch. Dist. R-2 v. Price*, 805 P.2d 1085 (Colo. 1991) (*en banc*).

58. *Kuhnhofer v. Naperville Community Sch. Dist.*, 203, 758 F. Supp. 468 (N.D. Ill. 1991).

59. *Brown v. Houston Indep. Sch. Dist.*, 763 F. Supp. 905 (S.D. Tex. 1991).

60. *Irving v. School Dist. No. 1-1A, Valley County*, 813 P.2d 417 (Mont. 1991).

61. *Cole v. Ruidoso Mun. Schs.*, 947 F.2d 903, 905 (10th Cir. 1991).

1983 liberty interest violation involving stigmatization where there was no indication her future employment had been restricted. The court observed that "it is necessary that the alleged stigmatization be entangled with some further interest, such as the ability to obtain future employment Absent this further 'occupational' interest, the stigmatization claim does not rise to a federal level and is best pursued under state tort law."⁶² In Alaska, the requirement that a grand jury's recommendations be based on substantial evidence and a provision for judicial review of a grand jury's recommendations prior to public disclosure were adequate to protect the reputation interests of individuals involved under both the United States and Alaska Constitutions.⁶³

Aspects of Notice

Rights to notice can arise under the Constitution and statutes. In a case interpreting pretermination rights of dismissed employees under *Cleveland Board of Education v. Loudermill*,⁶⁴ the Wisconsin Appeals Court determined that if a school board could have provided notice and a meaningful opportunity to respond prior to a discharge of a custodial employee, then post-termination state law remedies were not a defense to a section 1983 claim.⁶⁵ A tenured bus operator was ordered to be reinstated with back pay and other accrued benefits after a school district discharged him when bus routes had been consolidated without providing twenty days notice of a hearing date to consider abolition or consolidation of bus routes. The school board's claim that the decision in mid-August to reduce bus service because of budget cuts should have waived statutory requirements was rejected by the court. The Louisiana Court of Appeals refused to create "a jurisprudential good faith exception to the notice and hearing requirements of the statute."⁶⁶ In another case involving statutory interpretation, a warning letter sent to a teacher absent from teaching because of illness which failed to state the corrective action to be taken to avoid termination, and three other letters sent on three successive days which did not provide time for corrective action, were so flawed that the teacher was ordered reinstated with back pay.⁶⁷

Aspects of Hearing

Hearing rights focus on certain opportunities which the accused employee should have during the hearing so as to assure the employee a

62. *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 982 (10th Cir. 1991).

63. *O'Leary v. Superior Court*, Third Judicial Dist., 816 P.2d 163 (Alaska 1991).

64. 470 U.S. 552 (1985).

65. *Vorwald v. School Dist. of River Falls*, 466 N.W.2d 683 (Wis. Ct. App. 1991).

66. *Guy v. Madison Parish Sch. Bd.*, 579 So. 2d 1108, 1111 (La. Ct. App. 1991).

67. *In re Fugere*, 592 A.2d 518 (N.H. 1991).

minimum of fundamental fairness. In a case concerning the concept of confrontation of witnesses, the Kansas Court of Appeals determined that the superintendent's presence during school board deliberations to terminate a teacher was a due process violation because "it smacks of unfairness to the teacher whose rights are being considered."⁶⁸ However, in an Iowa case involving the termination proceeding for a faculty member who had sexual relations with a student, the superintendent's role as prosecutor, and testimony as witness for the superintendent by a nonparticipating school board member, did not "rebut the presumption of adjudication that a school is entitled to in the absence of direct, compelling evidence to the contrary."⁶⁹ A teacher with an indefinite contract who was terminated because of improper physical contact with his students was not deprived of rights under the Sixth Amendment where the students' allegations were presented through testimony of a guidance counselor and a child welfare case worker. The court noted that the teacher knew the identity of the students and he could have requested the students to appear at his disciplinary hearing but failed to do so.⁷⁰

The issue as to whether the body deciding the employee's fate was impartial was also raised. In a New York case, the action of a board of education, in paying to its selected tenure panel member a sum of money over and above the statutory *per diem*, constituted "bias *per se*" and was "destructive of the due process of law and a fair and impartial hearing." Given the facts of this case where the board-selected panel member (one of three panel members) requested and was paid the additional money, the faculty member whose disciplinary case had been heard by the panel did not have to prove actual bias. The court likened this case to a criminal conviction that would have to be set aside if a well-meaning prosecutor sought to supplement the salary of a needy juror.⁷¹ On the other hand, nonrenewal of a tenured teacher as part of a reduction-in-force did not deprive him of due process where the school board had prepared in advance the nonrenewal resolution to be decided later because the teacher had a hearing with oral arguments and a transcript of the hearing committee which had been read by each board member prior to the nonrenewal decision.⁷²

Dismissal, Nonrenewal, Demotion, and Discipline

State statutes, local board policies, and collective bargaining contracts outline the procedures that must be followed and the charges that may be

68. *Loewen v. Board of Educ., Unified Sch. Dist. No. 411, Marion County, Kan.*, 813 P.2d 385, 391 (Kan. Ct. App. 1991).

69. *Fairfield Community Sch. Dist. v. Justmann*, 476 N.W.2d 339, 340 (Iowa 1991).

70. *Hinkle v. Garrett-Keyser-Butler Sch. Dist.*, 567 N.E.2d 1173 (Ind. Ct. App. 1991).

71. *Syquia v. Board of Educ. of Harpurville Cent. Sch. Dist.*, 568 N.Y.S.2d 263, 266 (Sup. Ct. 1991).

72. *O'Hair v. Board of Educ., Unified Sch. Dist. No. 300*, 805 P.2d 40 (Kan. Ct. App. 1990).

levied when employees are subjected to many types of adverse employment actions. For example, a former teacher, who was allegedly harassed by the school principal, elected to take early retirement rather than pursue reinstatement through the procedures in the collective bargaining agreement. The teacher was prohibited from later seeking redress through a lawsuit.⁷³ In Indiana, a school board's statutory duty to rule on teacher dismissals did not permit the board to delegate that function to an arbitrator by means of a collective bargaining agreement.⁷⁴ In another case, a school district against which a \$50,367.70 judgment had been entered for wrongful discharge of a teacher was entitled to subtract \$35,400 as mitigation of damages for the money the teacher would have earned at a subsequent job had she not voluntarily resigned from that job.⁷⁵

Insubordination

Insubordination charges tend to involve an employee's refusal to adhere to previously imposed standards. A tenured elementary teacher who had pushed a student against a blackboard in violation of the school district's no corporal punishment rule could be suspended for one year without pay.⁷⁶ A teacher who had been instructed to refrain from physical contact with students, after numerous prior complaints of improper contact, could be dismissed by a school board for insubordination following a complaint of physical misconduct even though a hearing examiner had recommended only a one-year suspension.⁷⁷ In Tennessee, a high school principal could be dismissed for insubordination at the same time and for the same reasons as a teacher.⁷⁸ In an interesting Colorado case interfacing termination of a teacher for use of force and the state's unemployment statute, the state appeals court determined that the teacher, even though rightfully terminated for use of force, would nonetheless be eligible for unemployment compensation because a referee had decided that the use of force was justified.⁷⁹ Finally, a tenured teacher's persistent refusal to accept a seventh grade teaching assignment constituted irremediable conduct and, therefore, failure of the board of education to furnish statutory notice was unnecessary where there was no evidence such notice would have altered the teacher's conduct.⁸⁰

73. *Goldstein v. Tabb*, 575 N.Y.S.2d 902 (App. Div. 1991).

74. *Michigan City Educ. Ass'n v. Board of Sch. Trustees of the Mich. City Area Schs.*, 577 N.E.2d 1004 (Ind. Ct. App. 1991).

75. *State v. Bexley City Sch. Dist. Bd. of Educ.*, 574 N.E.2d 1112 (Ohio Ct. App. 1989).

76. *Cargill v. Sobol*, 565 N.Y.S.2d 902 (App. Div. 1991).

77. *Johnson v. School Bd. of Dade County*, 578 So. 2d 387 (Fla. Dist. Ct. App. 1991).

78. *Cooper v. Williamson County Bd. of Educ.*, 803 S.W.2d 200 (Tenn. 1990).

79. *School Dist. No. 1, City and County of Denver v. Frederickson*, 812 P.2d 723 (Colo. Ct. App. 1991).

80. *Board of Educ. of Chicago v. Harris*, 578 N.E.2d 1244 (Ill. App. Ct. 1991).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

Courts seem to give school boards considerable latitude in dealing with employee discipline even if that discipline is seemingly inconsistent with the decisions of other decision-making bodies or individuals. A permanent teacher whose contract had been canceled for failure to report child abuse, failure to maintain discipline, failure to file lesson plans in a timely manner, failure to educate her children adequately, and tardiness at faculty meetings had been terminated for just cause. She was not entitled to reinstatement even though she had been awarded unemployment compensation benefits because the Indiana Department of Employment and Training Services had determined that her dismissal was not for just cause.⁸¹ Similarly, a teacher of perceptually-impaired children who had been acquitted of criminal charges of sexual assault and child endangerment could nonetheless be convicted of official misconduct on the basis of evidence that she had exhibited sexually explicit magazines to her students, she had children make collages from those magazines, and she had discussed with students her sexual proclivities and those of others.⁸² A high school technician, found by a preponderance of evidence by a school board to have been engaged in inappropriate contact with students, could be dismissed by the board for misconduct even though the dismissal was more serious than the suspension and counseling recommended by the superintendent.⁸³ In another case, testimony of telephone employees and a chief state attorney investigator that a teacher had tampered with the school telephone system in order to listen in on employee conversations was sufficient to dismiss for moral misconduct even though the teacher had been acquitted of felony charges for eavesdropping.⁸⁴

Courts have upheld school district discipline for a wide variety of employee problems. The Tennessee Supreme Court held that a school superintendent could be dismissed from office for knowingly or willingly misconducting himself in office even though he had not personally benefited from his actions. The superintendent had dealt with a budgetary shortfall resulting from lower than projected enrollments by improperly using designated federal and employee funds to meet operational expenses.⁸⁵ A two-year suspension without pay imposed on a tenured speech teacher was not so unfair as to shock the conscience even though fourteen charges of unprofessional conduct were spread over two school years.⁸⁶ A disciplinary hearing whereby a tenured principal was demoted to classroom teacher on the grounds of willful neglect of duty was supported by the principal's failure or refusal to attend scheduled meetings without advising the superintendent he

81. *Aigner v. Cass Sch. Township of Laporte County*, 577 N.E.2d 983 (Ind. Ct. App. 1991).

82. *State v. Parker*, 592 A.2d 228 (N.J. 1991).

83. *Allen v. School Bd. of Dade County*, 571 So. 2d 568 (Fla. Dist. Ct. App. 1990).

84. *Rado v. Board of Educ. of Borough of Naugatuck*, 583 A.2d 102 (Conn. 1990).

85. *State v. Peters*, 815 S.W.2d 161 (Tenn. 1991).

86. *Land v. Commissioner of Educ. of State of N.Y.*, 571 N.Y.S.2d 623 (App. Div. 1991).

would be absent, refusal to sign various reports he was required to sign, and changing and/or cancelling the dates of workshops without authorization.⁸⁷ Dismissal of a tenured teacher for willful and deliberate misconduct was supported by her entering the principal's office without permission, altering warnings contained in her personnel file without authorization, ignoring established procedures for disciplining students despite prior warnings, refusal to meet with a troubled student's parents, failure to send to parents a student's progress reports, not having her lesson plan book available as required by district policy on three occasions, and inaccurately grading students.⁸⁸ A New York court upheld dismissal of a custodian where the record demonstrated that he had been discharged for misconduct arising out of five incidents of theft of services, in addition to his failure to report to work for fifteen full days and five half days. The custodian had attempted to argue that his dismissal was for excessive absence, resulting from his alcoholism, in violation of state law.⁸⁹ In an interesting Oregon case, that state's supreme court determined that dismissal of a permanent teacher can be based on out-of-school conduct. In this case the teacher had been aware for two years that her husband had been using their home to grow and sell marijuana.⁹⁰

In only one reported case in this area was an employee's discipline overturned. In an Illinois case, conduct unbecoming a teacher, including sexual contact with students, was considered remediable, and therefore failure of the school board to provide the statutory written warning prior to dismissal action was fatal.⁹¹

A teacher's dismissal for misconduct may not preclude payment of unemployment compensation benefits. In a Pennsylvania case, a teacher's dismissal following his pleading guilty to a charge of criminal harassment during a strike, did not constitute "willful misconduct" under the facts of the case to preclude entitlement to unemployment compensation.⁹²

Immorality

As in past years, employees lost all cases involving discipline for immorality. A high school teacher and softball coach who had given unsolicited kisses and hugs and gifts to two female students and who had written overtly sexual letters to the two students had engaged in irremediable conduct under Illinois law requiring his removal from his position.⁹³ A

87. *Baker v. St. James Parish Sch. Bd.*, 584 So. 2d 369 (La. Ct. App. 1991).

88. *Jackson v. Sobol*, 565 N.Y.S.2d 612 (App. Div. 1991).

89. *Leyden v. Board of Educ. of the N. Merrick Union Free Sch. Dist.*, 573 N.Y.S.2d 303 (App. Div. 1991).

90. *Jefferson County Sch. Dist. No. 509-J v. Fair Dismissal Appeals Bd.*, 812 P.2d 1384 (Or. 1991).

91. *Hegener v. Board of Educ. of Chicago*, 567 N.E.2d 566 (Ill. App. Ct. 1991).

92. *Phoenixville Area Sch. Dist. v. Unemployment Compensation Bd. of Review*, 596 A.2d 889 (Pa. Commw. Ct. 1991).

93. *Board of Educ. of Sparta Community Unit Sch. Dist. No. 140 v. State Bd. of Educ.*, 577 N.E.2d 900 (Ill. App. Ct. 1991).

teacher who had been dismissed after having sexual relations with a female senior during her final semester in high school could not exclude from his school board hearing evidence from an illegal stop, arrest, and search by the police when the teacher was having sex with the same former student in his car during September following her graduation. The court refused to apply the criminal exclusionary rule because "the school district's interest in protecting its students and insuring a safe school environment would be jeopardized by the exclusion of evidence concerning serious misconduct by its employees."⁹⁴ Finally, the Missouri Court of Appeals extended the definition of immoral conduct to include charges of filing false reports to the state concerning surplus property and incorrectly furnishing personal information that resulted in an overpayment of funds. In upholding the teacher's termination, the court noted that immoral conduct means conduct that renders a teacher unfit to teach and is not limited solely to sexual conduct.⁹⁵

Incompetence

Incompetency seldom appears as the single reason for employee discharge, apparently because of the difficulty of proof. However, tenured teacher dismissals have been upheld where a teacher had made repeated spelling and grammatical errors,⁹⁶ and where a teacher had been convicted of failing to file income tax returns.⁹⁷

Compliance with School Board Policies and State Statutes

School districts prevailed in a significant number of cases involving interpretation of state laws. An Illinois statute requiring written notice prior to dismissal of educational support employees did not apply to reduction in hours of a temporary and substitute custodian. The statute was unambiguous in that it applied only to dismissals and not to reductions in hours, and even if the statute did apply to reductions in hours, it did not apply to temporary or substitute employees.⁹⁸ A school nurse whose employment contract had been nonrenewed after ten years was not entitled to Pennsylvania statutory notice and right to a hearing provided for teachers because a school nurse was not a teacher under state law.⁹⁹ In North Carolina a state statute, which provided that a suspended teacher against whom dismissal proceedings had not been initiated within ninety days had to be reinstated, did not prohibit the

94. *Sertik v. School Dist. of Pittsburgh*, 584 A.2d 390, 393 (Pa. Commw. Ct. 1990).

95. *Cochran v. Board of Educ. of Mex. Dist. No. 59*, 815 S.W.2d 55 (Mo. Ct. App. 1991).

96. *Beck v. James*, 793 S.W.2d 416 (Mo. Ct. App. 1990).

97. *McCullough v. Illinois State Bd. of Educ.*, 562 N.E.2d 1233 (Ill. App. Ct. 1990).

98. *Buckellew v. Board of Educ. of Georgetown-Ridge Farm Community Unit Sch. Dist. #4*, 575 N.E.2d 556 (Ill. App. Ct. 1991).

99. *Ferreira v. Bedford Sch. Dist.*, 584 A.2d 182 (N.H. 1990).

superintendent from initiating dismissal proceedings after ninety days. In this case the legislative intent was interpreted to mean that failure to initiate dismissal proceedings within a ninety day period against a teacher for sexual conduct with a student meant only that the teacher had to be reinstated and the suspension removed from the teacher's record, not that the superintendent was precluded from initiating dismissal proceedings.¹⁰⁰ A probationary high school teacher had no breach of contract cause of action where a school board failed to approve renewal of her contract, despite her principal's evaluation that she had met or exceeded expectations of all performance criteria. A statutory requirement that evaluations be performed did not require those evaluations to be considered or followed by a school board.¹⁰¹ A tenured teacher's classroom suspension, which lasted for two years without reinstatement before a school board hearing was held dismissing the teacher, was found to comply with the state's Teacher Tenure Act because the teacher was eventually afforded the proceedings of notice and hearing required by the Act. Any danger of arbitrariness, capriciousness, or bias could be curbed on remand to the trial court through a hearing *de novo*.¹⁰² Notice to a tenured teacher was not defective under Minnesota statute even though it did not contain the statutorily required statement that the teacher was entitled to make a request for a hearing after receipt of the notice. In this case, a copy of the statute had been attached to the notice and the notice further provided that "[y]ou will note that you have the right to select a private or public hearing."¹⁰³

In a case interpreting the termination notice provision of Alabama's tenure statute requiring notice to be given to the teacher by the last school day, the state supreme court determined that a notice placed in the teacher's mailbox on the last day of school, which the teacher did not actually receive because she did not go to her mailbox prior to leaving school, nonetheless satisfied the statute. The teacher had requested that the notice be placed in her school mailbox and the court found that the teacher's leaving on the last day without checking her mailbox was an intentional avoidance of receipt of notice.¹⁰⁴ Under Virginia statutes, a school principal acquires tenure by serving three years in that position in the same school district, and thus a teacher who had acquired tenure as a principal in one school district, but then took a principal position in a neighboring school district, could be nonrenewed without prior notice because she had not served three years in her new position.¹⁰⁵

In a case reflecting the limited right of notice for nontenured teachers in New Mexico, notice received by a nontenured teacher on May 29 that her

100. *Evers v. Pender County Bd. of Educ.*, 407 S.E.2d 879 (N.C. Ct. App. 1991).

101. *Berhorst v. Maries County R-II Sch. Dist.*, 805 S.W.2d 696 (Mo. Ct. App. 1991).

102. *Van Hooser v. Warren County Bd. of Educ.*, 807 S.W.2d 230 (Tenn. 1991).

103. *In re Peterson*, 472 N.W.2d 687 (Minn. Ct. App. 1991).

104. *Ex parte Geneva City Bd. of Educ.*, 575 So. 2d 1114 (Ala. 1990).

105. *Lee-Warren v. School Bd. of Cumberland County*, 403 S.E.2d 691 (Va. 1991).

employment would terminate as of May 30, the last day of school, satisfied the statutory requirement that written notice of termination be served "on or before the last day of the school year." A state board of education regulation, which stated that failure to give notice at least fourteen days before the end of the school year would constitute prejudicial departure of the regulation and warrant reversal of the board's decision, did not apply here where the teacher had received a memorandum from the superintendent on April 22 that he recommended nonrenewal at the board meeting to be held the same day, and the teacher was in fact present at the board meeting where the board voted to terminate her on the last day.¹⁰⁶ In an Indiana case, a nonpermanent teacher, who received notice and reasons for nonrenewal, was alleged to have been rude to personnel and parents and to have used profanity in the presence of students. The court held that she received all the notice to which she was entitled under state law. Once the school board had complied with statutory nonrenewal procedures for nonpermanent employees the "[b]oard's decision of nonrenewal [was] final and [was] not subject to review."¹⁰⁷ In a case involving a resignation, a Georgia appeals court determined that a tenured teacher who had resigned was not entitled to notice of nonrenewal under the state's tenure statute.¹⁰⁸

Employees prevailed in a significant number of cases, with some cases addressing a lack of appropriate notice as the principal reason and others focusing on the appropriate amount of damages or compensation. In one of two Alabama cases, a cafeteria worker who had been employed for only eight months was entitled to notice and access to a post-termination hearing under the state's Fair Dismissal Act which established a three year probationary period because the school district shortened the probationary period by contract.¹⁰⁹ In the second Alabama case involving the same statute, failure of an employer to acquire from a probate judge within sixty days a list of qualified candidates for a review panel was interpreted to mean the employer had abandoned his original intention to terminate employment and the employee was therefore entitled to back pay and reinstatement.¹¹⁰

Two cases decided under Kentucky's dismissal statute indicate the problem when reasons for dismissal are not specific or accurate. In one case, a routine nonrenewal letter sent to all first-year teachers, most of whom were subsequently rehired, did not satisfy the statutorily required "specific, detailed, and complete statement of grounds" for nonrenewal.¹¹¹ In the second case the reason furnished for reduction in a teacher's responsibility, that the teacher's duties were to be incorporated into central office members'

106. *Provoda v. Maxwell*, 808 P.2d 28, 29 (N.M. 1991).

107. *Tishey v. Board of Sch. Trustees of N. Newton Sch. Corp.*, 575 N.E.2d 1018, 1021 (Ind. Ct. App. 1991).

108. *Oates v. Coffee County Bd. of Educ.*, 400 S.E.2d 355 (Ga. Ct. App. 1990).

109. *Kendrick v. Jefferson County Bd. of Educ.*, 932 F.2d 910 (11th Cir. 1991).

110. *Hutchinson v. Alabama Inst. for Deaf and Blind*, 578 So. 2d 1305 (Ala. Civ. App. 1990).

111. *Gibson v. Board of Educ. of Jackson County*, 805 S.W.2d 673 (Ky. Ct. App. 1991).

duties, was deficient where the real reason was that staff members had numerous complaints against the teacher.¹¹²

Teachers were entitled to reinstatement in California where a temporary teacher had served for more than 75% of the school year¹¹³ and in Illinois where the teacher's alleged misconduct was remediable under state statute and the teacher had not received the appropriate notice.¹¹⁴ In Idaho, a maintenance electrician, who was terminated after he had reported violations to the state inspector, raised issues of material fact as to whether he came within the public policy exception to the employment-at-will doctrine so as to preclude summary judgment for the school district.¹¹⁵

A school bus driver who had filed and settled a worker's compensation claim was held in Texas to have been retaliated against when the employee found that she had been terminated after being released to return to work. The Texas court held that the notice requirement under the Texas Tort Claims Act did not apply to the employee's lawsuit for retaliation for filing a worker's compensation claim because the worker's compensation statute provided a separate remedy for retaliation actions.¹¹⁶

Under a District of Columbia statute providing for final administrative appeal to an Office of Employee Appeals, a teacher dismissed in 1977 was entitled to avail herself of the appeal process, even though the statute was passed in 1980. The federal appeals court reasoned that, absent contrary legislative intent, statutes pertaining only to procedure apply to pending cases.¹¹⁷

A number of cases addressed the problem of compensation for employees whose discipline was under consideration or who had been reinstated. In New York a teacher was entitled to nine months pay for the period of time between suspension for alleged sexual misconduct and pending criminal charges arising out of the same set of facts. Even though the teacher had requested extension of the administrative proceeding based on a concern that his criminal defense might be adversely affected, the teacher was nonetheless entitled to the pay because there was no evidence he had acted in bad faith or engaged in obstructionist conduct.¹¹⁸ An Alabama tenured teacher ordered reinstated with full pay after a wrongful discharge did not have to use sick or personal days for the days he was ill, even though had his dismissal not been wrongful, he would have been required to use sick or personal days.¹¹⁹ A 4% reduction in a vocational counselor's salary constituted a "severe reduction" under the North Dakota nonrenewal statute necessitating

112. *Board of Educ. of McCreary County v. Williams*, 806 S.W.2d 649 (Ky. Ct. App. 1991).

113. *Kalamaras v. Albany Unified Sch. Dist.*, 277 Cal. Rptr. 577 (Ct. App. 1991).

114. *Board of Educ. of Chicago v. Johnson*, 570 N.E.2d 382 (Ill. App. Ct. 1991).

115. *Ray v. Nampa Sch. Dist. No. 131*, 814 P.2d 17 (Idaho 1991).

116. *Williams v. Fort Worth Indep. Sch. Dist.*, 816 S.W.2d 838 (Tex. Ct. App. 1991).

117. *Montgomery v. District of Columbia*, 598 A.2d 162 (D.C. App. 1991).

118. *Derle v. North Bellmore Union Free Sch. Dist.*, 568 N.Y.S.2d 888 (Ct. App. 1991).

119. *Lauderdale Bd. of Educ. v. Moore*, 574 So. 2d 811 (Ala. Civ. App. 1990).

compliance with the statute's notice requirements.¹²⁰ In a South Dakota case, damages computed on the basis of back pay for the 1985-86 year extended through the 1989-90 year because the school district had still not provided the three weeks notice required by statute.¹²¹

A significant number of other cases dealt with such divergent topics as the appropriate standard for school board member dismissal,¹²² use of teacher grade distribution for performance evaluation,¹²³ appropriateness of notice of discontinuance to a probationary teacher where the principal had signed the superintendent's name without his authorization,¹²⁴ use of a grievance board rather than school boards in West Virginia to decide dismissal cases,¹²⁵ and the rights of an assistant superintendent under the state's whistleblower statute.¹²⁶ In Louisiana a tenured teacher dismissal case was remanded to the school board to reconstruct as nearly as possible the hearing transcript after the transcript had been destroyed.¹²⁷ In decisions from four different states, courts reconciled a school board's salary schedule with a state statute permitting school boards to withhold increments,¹²⁸ invalidated the use of grievance procedures to decide teacher discharge cases,¹²⁹ held that an employee hired as both superintendent and principal did not have to exhaust her remedies under the state's Administrative Procedure and Review Act where she was terminated only as the superintendent,¹³⁰ and determined that a three-month delay between the school board's vote to cancel a tenured teacher's contract and the superintendent's notice to the teacher did not violate the state's tenure statute.¹³¹ Reasons given a high school principal for nonrenewal of his contract, including irregularities in the summer swimming program overseen by the principal and failure to carry out responsibilities, were adequate under Indiana's Teacher Tenure Act.¹³² Finally, in two cases involving procedure, a school district was not entitled to a default judgment against a teacher who had not filed an answer to a school board's appeal from an adjudicator's decision,¹³³ but a teacher lost in his

120. *Wenman v. Center Bd. of Valley City Multi-Dist. Vocational Center*, 471 N.W.2d 461 (N.D. 1991).

121. *White Man v. Gunnick*, 473 N.W.2d 148 (S.D. 1991).

122. *Willison v. Pine Point Experimental Sch.*, 464 N.W.2d 742 (Minn. Ct. App. 1991).

123. *Brown v. Wood County Bd. of Educ.*, 400 S.E.2d 213 (W. Va. 1990).

124. *Sorell v. Board of Educ. of City Sch. Dist. of N.Y.*, 562 N.Y.S.2d 572 (App. Div. 1990).

125. *Fayette County Bd. of Educ. v. Lilly*, 403 S.E.2d 431 (W. Va. 1991).

126. *Picogna v. Board of Educ. of Cherry Hill, Camden County*, 592 A.2d 570 (N.J. Super. Ct. App. Div. 1991).

127. *Muggivan v. Jefferson Parish Sch. Bd.*, 583 So. 2d 1157 (La. Ct. App. 1991).

128. *Probst v. Board of Educ. of Haddonfield, Camden County*, 592 A.2d 279 (N.J. Super. Ct. App. Div. 1991).

129. *Michigan City Educ. Ass'n v. Board of Sch. Trustees of the Mich. City Area Schs.*, 577 N.E.2d 1004 (Ind. Ct. App. 1991).

130. *Kish v. Chilhowee R-IV Sch. Dist.*, 814 S.W.2d 649 (Mo. Ct. App. 1991).

131. *Richardson v. State Tenure Comm'n*, 585 So. 2d 49 (Ala. Civ. App. 1991).

132. *Joseph v. Lake Ridge Sch. Corp.*, 580 N.E.2d 316 (Ind. Ct. App. 1991).

133. *Board of Directors of the Starmont Community Sch. Dist. v. Banke*, 474 N.W.2d 558 (Iowa 1991).

wrongful discharge suit against the school district after he had failed to comply with a statutory notice requirement.¹³⁴

Two Massachusetts school bus drivers who had challenged their dismissals under a state statute that prohibited employers from making employment decisions regarding acts that did not result in criminal conviction or criminal convictions that were more than five years old lost in their bid for reinstatement when the state supreme court interpreted the statute to mean that the state could not refuse to furnish the information, not that the school committee could not request the information. If the state wrongfully furnished the information, the school committee was not prohibited by the statute from acting upon it.¹³⁵

Reduction-in-force and Involuntary Leaves of Absence

Reorganization or consolidation of school districts or property within districts, declining student enrollments, or fiscal restraints may necessitate a reduction-in-force (RIF). The sufficiency of reasons for RIF, the actual selection of employees to be laid off, the realignment or reassignment of employees, and call-back rights are governed by state tenure statutes, local board policies, and collective bargaining agreements.

Necessity for Reduction-in-force

In deciding a case that involved the state's dismissal statute and the hearsay rule, the Mississippi Supreme Court determined that witnesses at a nonrenewal hearing could testify as to their personal knowledge regarding projected decreases in student enrollment without violating the hearsay rule.¹³⁶

Elimination of Position

Cases in this section tend to overlap with those in the next section concerning selection of employees to be retained. A psychometrist who was also a tenured teacher had been properly RIFed where psychometrist and counselor positions had been combined and the psychometrist lacked the required certificate to fill a counselor position.¹³⁷ A teacher ordered reinstated because she had been wrongfully discharged after her position had been eliminated nonetheless had a duty to mitigate damages and the amount

134. *Hermie v. Union Free Sch. Dist.*, 562 N.Y.S.2d 185 (App. Div. 1990).

135. *Bynes v. School Comm. of Boston*, 581 N.E.2d 1019 (Mass. 1991).

136. *Stone County Sch. Bd. v. McMaster*, 573 So. 2d 753 (Miss. 1990).

137. *Stewart v. Fort Wayne Community Schs.*, 564 N.E.2d 274 (Ind. 1990).

of back pay could be reduced by the amount she would have made had she not rejected a part-time teaching position from the school district.¹³⁸

Selection of Employees

Determination of employees to be RIFed involves interpretation of state statutes as well as employment contracts. In a Louisiana case, the state appeals court decided that termination of a female certified contract supervisor, while retaining a noncertified male supervisor, was improper because there had been no criticism of the female plaintiff's job performance or job qualifications. Plaintiff was entitled to two years back pay under state law, less mitigated damages, but was not entitled to reinstatement.¹³⁹ In calculating seniority credit to determine the employee to RIF, a public school district did not have to give credit for time a teacher had been assigned to a parochial school since the parochial school day had been only six-sevenths of the public school day and seniority credit applied only to full-time positions.¹⁴⁰ In deciding which of two employees with the same employment date had to be placed on unrequested leave of absence, the Minnesota Court of Appeals defined the term "step" in the collective bargaining agreement to mean years of experience and years employed by the school district, not just salary.¹⁴¹

Realignment/Reassignment

The determination as to how employees are to be realigned or reassigned during RIFing is generally governed by statute or collective bargaining contract. In a Pennsylvania case, a collective bargaining agreement had removed discretion from a local school board to determine whether a realignment was educationally sound.¹⁴² An Illinois school board was not required to realign teaching positions for a tenured teacher at the expense of three less senior teachers where the more senior teacher lacked the state minimum requirements to teach in the appropriate fields.¹⁴³ In Minnesota, a principal's reinstatement rights reverted back to a former principal job from which he had been bumped,¹⁴⁴ and realignment in a different district should have been accomplished on the basis of individual courses so that a physical education teacher could have been retained over a probationary teacher hired

138. *Gross v. Board of Educ. of Elmsford Union Free Sch. Dist.*, 571 N.Y.S.2d 200 (N.Y. 1991).

139. *Burns v. Monroe City Sch. Bd.*, 577 So. 2d 1205 (La. Ct. App. 1991).

140. *Cole v. Board of Educ. of Syosset Cent. Sch. Dist.*, 562 N.Y.S.2d 209 (App. Div. 1990).

141. *Fredrich v. Independent Sch. Dist. No. 720*, 465 N.W.2d 692 (Minn. Ct. App. 1991).

142. *Allegheny Intermediate Unit v. Allegheny Intermediate Unit Educ. Ass'n*, 590 A.2d 1348 (Pa. Commw. Ct. 1991).

143. *Hampson v. Board of Educ., Thornton Fractional Township High Schs., Dist. 215, Cook County*, 576 N.E.2d 54 (Ill. App. Ct. 1991).

144. *Mohn v. Independent Sch. Dist. No. 697, Eveleth*, 471 N.W.2d 723 (Minn. Ct. App. 1991).

to teach science courses.¹⁴⁵ In a New York case, retirement by a principal meant the end of seniority rights for the purpose of assignment to another position.¹⁴⁶ Reassignment cases can involve damage awards, but an Indiana superintendent who had been reassigned when his contract had not been renewed, was not entitled to a \$400,000 punitive damages award after the trial judge dismissed his count for compensatory damages.¹⁴⁷

Call-back Rights

Call-back rights are generally governed by statute while collective bargaining contracts that seek to extend those rights may be null and void.¹⁴⁸ By statute in Minnesota, those on call-back have a certain number of years protection and even a part-time position must be offered to a teacher on the call-back list.¹⁴⁹ However, a Michigan statute could not be applied retroactively,¹⁵⁰ and in New York, no retroactive statutory application was appropriate even for a vacant position that arose one day after the statutory minimum number of days had expired.¹⁵¹

Contract Disputes

Board Policies and Contract Stipulations

A significant number of contract disputes concerned the amount of compensation to be paid to particular employees. The state of Indiana could not recover overtime funds paid to a school district treasurer where payment for overtime had been authorized on each occasion by the local school board.¹⁵² A union agreement, which compensated special education teachers who normally taught severely handicapped students at a higher rate than teachers who taught mildly or moderately handicapped children, was determined to have a rational state objective and was therefore not violative of the equal protection clause.¹⁵³ A school board contract for a temporary employee, which clearly stated that she was to receive 1/12 of a particular sum for each month worked, could not later be changed to 165/190 of the sum based on the total number of school days worked.¹⁵⁴ A school district policy

145. *In re Dallman*, 470 N.W.2d 148 (Minn. Ct. App. 1991).

146. *Girard v. Board of Educ. of City Sch. Dist. of Buffalo*, 572 N.Y.S.2d 185 (App. Div. 1991).

147. *Grimes v. Jones*, 567 N.E.2d 858 (Ind. Ct. App. 1991).

148. *Board of Educ. of Depew Union Free Sch. Dist. v. Depew Teachers Org., Inc.*, 562 N.Y.S.2d 274 (App. Div. 1990).

149. *Sherek v. Independent Sch. Dist.*, 464 N.W.2d 582 (Minn. Ct. App. 1990).

150. *Morgan v. Taylor Sch. Dist.*, 466 N.W.2d 322 (Mich. Ct. App. 1991).

151. *Raben v. Board of Educ. of the Hauppauge Union Free Sch. Dist.*, 572 N.Y.S.2d 921 (App. Div. 1991).

152. *Hunt v. State*, 564 N.E.2d 568 (Ind. App. Ct. 1990).

153. *Litman v. Board of Educ. of N.Y.*, 565 N.Y.S.2d 93 (App. Div. 1991).

154. *Lipp v. Mental Health for Children, Inc.*, 812 P.2d 7 (Or. Ct. App. 1991).

which permitted only one step advancement in salary scale per year could be applied so that a teacher who had changed salary lines due to a new certification was not also entitled to a year of service increase.¹⁵⁵ In an Alabama case reconciling a legislative 7.5% equalization salary increase and a local school board's compensation system utilizing a base salary, years of service, and a bonus arrangement, the Alabama appeals court determined that a lunchroom manager was entitled to a 7.5% increase of her total yearly compensation, not just base salary. This case hinged on the local board's salary increase policy of using total compensation for past increases.¹⁵⁶ In another Alabama case, a local school board did not abuse its discretion in paying compensation to a superintendent on the basis of a multiple of a nine-month teacher's salary, even though his successor's salary was determined on the basis of a twelve-month teacher's salary.¹⁵⁷

Two cases dealt with the status of tutors as employees. Tutors hired for educational services, such as test preparation, academic guidance, and private in-home tutoring, were employees for the purpose of assessing unemployment insurance contributions against service.¹⁵⁸ A tutor hired by a school district to teach handicapped children is a teacher under Ohio statutory law and therefore must be paid according to the district pay schedule. The tutor was entitled not only to back pay for the difference between the scheduled pay and contract pay but also to post-judgment interest.¹⁵⁹ In an interesting case involving the minimum salary to be paid part-time teachers, an Alabama appeals court declared that a teacher can be hired on a part-time contract at less than the salary scale until the teacher qualifies at the end of three years for continuing contract status. After becoming tenured, the teacher must be paid according to the minimum salary schedule.¹⁶⁰ In a contract dispute involving the amount of compensation for the position of Coordinator of Special Programs, a Florida appeals court determined that the school board's failure to set forth findings of fact and conclusions of law as required by state statute was reversible error.¹⁶¹

Contract disputes can also arise concerning payment of employees while an employee is on leave. A contract employee who requested payment for his unused vacation time was entitled to payment because he had been prevented from taking vacation by his work assignments and he had been assured by the former Superintendent of Schools and his successor that he would be paid. This payment was awarded even though the letter of termination issued approximately two months prior to his termination date

155. *Basler v. Princeton City Sch. Dist. Bd. of Educ.*, 580 N.E.2d 805 (Ohio Ct. App. 1989).

156. *Etowah County Bd. of Educ. v. Smith*, 584 So. 2d 526 (Ala. 1991).

157. *Reeder v. Geneva County Bd. of Educ.*, 586 So. 2d 222 (Ala. Civ. App. 1991).

158. *In re Educad, Inc.*, 574 N.Y.S.2d 408 (App. Div. 1991).

159. *State ex rel. Tavenner v. Indian Lake Local Sch. Dist. Bd. of Educ.*, 578 N.E.2d 464 (Ohio 1991).

160. *Jones v. Ingram*, 585 So. 2d 64 (Ala. Civ. App. 1991).

161. *Winbush v. School Bd. of Osceola County*, 585 So. 2d 465 (Fla. Dist. Ct. App. 1991).

instructed him to use his accrued vacation prior to his last day.¹⁶² An employee for nine years of an adult basic education program which served four counties was not entitled to sixty days sick leave from one of the four counties that subsequently employed her because the county was not her employer during the nine years when she allegedly accrued the sick leave.¹⁶³ In an interesting employee relations case, a teacher who took a personal leave of absence from his teaching position in South Dakota and then used the leave to teach in Alaska was entitled to reinstatement to a teaching position in South Dakota when the leave was over, as well as a salary differential plus interest. The teacher was found not to have deceived the school board in requesting leave without stating reasons even though school board policy did not permit leave time to be used for teaching.¹⁶⁴

Contract disputes can arise involving a wide range of factual problems concerning the language and conditions of contract. In New York, employment of a part-time, nonprobationary teacher without a term amounted to employment-at-will.¹⁶⁵ In two separate cases, teacher-applicants had no causes of action against school districts when one had no contract signed by a representative of the district,¹⁶⁶ and the other never had his contract presented to the board for approval.¹⁶⁷ In an Alabama case, a secretary's resignation was effective when accepted by the superintendent and therefore she could not withdraw it even if not yet accepted by the board.¹⁶⁸ The attempt by a South Dakota school district to fill vacancies in its attendance center with nonstaff applicants rather than current teachers was considered a violation of the district's collective bargaining agreement.¹⁶⁹ A New Jersey secretary who sought to extend her announced retirement date could not have imposed on her the passage of a performance-based evaluation, where the board had no rationale for this request, and this evaluation would conflict with past practice.¹⁷⁰ In two similar cases involving school board attempts to fill positions with noncertified personnel, courts in West Virginia¹⁷¹ and Alabama¹⁷² rejected such efforts where the personnel lacked the required certification. Additionally, a Texas case dealt with a school district's attempt to approve a tax rate lower than that in existence during the

162. *May v. Board of Educ. of the Ballston Spa Cent. Sch. Dist.*, 567 N.Y.S.2d 186 (App. Div. 1991).

163. *Parker v. Summers County Bd. of Educ.*, 406 S.E.2d 744 (W. Va. 1991).

164. *Rininger v. Bennett County Sch. Dist.*, 468 N.W.2d 423 (S.D. 1991).

165. *Lashure v. Board of Educ. of Webb Schs., Old Forge*, 562 N.Y.S.2d 894 (App. Div. 1990).

166. *DeMarr v. Kansas City, Mo. Sch. Dist.*, 802 S.W.2d 537 (Mo. Ct. App. 1991).

167. *Norton v. School Dist. No. 1, City and County of Denver, Denver Pub. Schs.*, 807 P.2d 1160 (Colo. Ct. App. 1990).

168. *Mitchell v. Jackson County Bd. of Educ.*, 582 So. 2d 1128 (Ala. Civ. App. 1991).

169. *Wessington Springs Educ. Ass'n v. Wessington Springs Sch. Dist.*, 36-2, 467 N.W.2d 101 (S.D. 1991).

170. *Hall v. Board of Educ. of Jefferson, Morris County*, 593 A.2d 304 (N.J. 1991).

171. *Egan v. Board of Educ. of Taylor County*, 406 S.E.2d 733 (W. Va. 1991).

172. *Floyd v. Cullman County Bd. of Educ.*, 575 So. 2d 577 (Ala. Civ. App. 1991).

prior year, but the effort was blocked by a court where a small tax increase and a surplus from the previous year would be sufficient to fund teacher contracts.¹⁷³

An Ohio court was called upon to determine whether the contract of a school board member's wife as assistant school nurse was void under state statute because the board member was "pecuniarily interested" in the contract. The court determined that the statute applied only to teacher or instructor positions and, in any case, any benefit derived by the board member was indirect.¹⁷⁴

Administrative Regulations and Statutory Provisions

The greatest number of cases in this section involved interpretations of state statutes or regulations as those interpretations affected employee compensation and benefit rights. Under Kansas law, a substitute teacher with an oral contract to teach in the fall had a reasonable assurance of returning to work in the same capacity and thus was ineligible for unemployment benefits during the summer months.¹⁷⁵ A New York teacher who had taught history and social studies in a parochial school taught secular subjects and was therefore not ineligible for unemployment compensation benefits.¹⁷⁶ Similarly, in Pennsylvania, six *per diem* teachers who had worked most of the days up to holiday recess were entitled to unemployment compensation benefits for holiday recess where state statute prohibited benefits to employees of educational institutions who worked "in period" before a holiday recess and who had a reasonable assurance of returning to work.¹⁷⁷ In a case concerning a teacher strike causing schools to start late and Pennsylvania's Weather Emergency Act, a state court determined that teachers were entitled to eleven days more pay than they had been awarded by the school board. The narrow factual question focused on whether the school board should have restructured the school instructional calendar following reopening of the schools in October after the strike rather than wait until after eleven days of school cancellation because of severe weather and fuel shortages. Under the Weather Emergency Act, the teachers were entitled to the same pay they would have received had the weather emergency not occurred.¹⁷⁸

A New Mexico statute which prohibited members of the state legislature from receiving other compensation for work performed as "officer or employee of the state" did not apply to school teachers and administrators.

173. *Bowman v. Lumberton Indep. Sch. Dist.*, 801 S.W.2d 883 (Tex. 1990).

174. *Scherer v. Rock Hill Local Sch. Dist. Bd. of Educ.*, 579 N.E.2d 525 (Ohio Ct. App. 1990).

175. *Mogren v. State Employment Security Bd. of Review*, 801 P.2d 64 (Kan. Ct. App. 1990).

176. *In re Vecchio*, 575 N.Y.S.2d 215 (App. Div. 1991).

177. *Armstrong Sch. Dist. v. Unemployment Compensation Bd. of Review*, 596 A.2d 1250 (Pa. Commw. Ct. 1991).

178. *Freidhoff v. Board of Sch. Directors of Conemaugh Valley Sch. Dist.*, 586 A.2d 1038 (Pa. Commw. Ct. 1991).

In interpreting the statute the court determined that school teachers and administrators were not among the group of employees who threatened legislative independence through what the court referred as "the 'Huey Long' scenario in Louisiana."¹⁷⁹ A statutory provision which required school districts to pay teachers on a uniform basis did not permit a school district to grandfather existing salary entitlements, freeze employees who had failed to complete additional course work, or limit the classification advances.¹⁸⁰ In an interesting case involving interpretation of statutory "years of experience" for increment salary purposes the West Virginia Supreme Court determined that time spent as a lead teacher in a Head Start program, prior to being certified as a teacher by the state, should count as "years of experience" because the term applies to employment in the teaching profession in general.¹⁸¹ A school secretary who had not taken vacation year after year was not entitled on retirement to be paid for unused vacation days in excess of one year since vacation pay in excess of one year was extra compensation for state employees prohibited by the state constitution.¹⁸² A school administrator retiring in Alaska was not entitled to use his lump sum for unused leave in calculating his base salary for the past three years for the purpose of determining retirement benefits.¹⁸³

Several cases focused on whether individuals were school employees. Under North Carolina law, a school bus driver injured while driving home from a meeting he was required to attend was not entitled to worker's compensation since commuting to or from work was not in the scope of employment.¹⁸⁴ In West Virginia, current elected members of county school boards are "employees" under the state Public Employees Retirement Act and thus can participate in the state retirement system.¹⁸⁵ An Illinois appeals court had occasion to determine whether a certified teacher, who was employed by a private music corporation and who had been assigned to a public school district as a full-time band director, was entitled to participate in the Teachers' Retirement System as one under the Pension Code who "teaches or is employed in the public common schools." The court treated the employment factor as controlling and since the teacher taught in, but was not employed by, a public school district the teacher was not eligible under the Pension Code.¹⁸⁶ Assistants of civil service custodians hired to do custodial work for schools were school district employees for unemploy-

179. *State ex rel. Stratton v. Roswell Indep. Schs.*, 806 P.2d 1085, 1093 (N.M. Ct. App. 1991).

180. *California Teachers Ass'n v. Governing Bd. of Lancaster Sch. Dist.*, 276 Cal. Rptr. 222 (Ct. App. 1990).

181. *Bright v. Tucker County Bd. of Educ.*, 399 S.E.2d 176 (W. Va. 1990).

182. *Seymour v. Christiansen*, 1 Cal. Rptr. 2d 257 (App. Div. 1991).

183. *Flisock v. State, Div. of Retirement and Benefits*, 818 P.2d 640 (Alaska 1991).

184. *Wright v. Wake County Pub. Schs.*, 405 S.E.2d 228 (N.C. Ct. App. 1991).

185. *State ex. rel. Dille v. West Virginia Pub. Employees Retirement Sys.*, 401 S.E.2d 916 (W. Va. 1991).

186. *Falato v. Teachers' Retirement Sys. of Ill.*, 568 N.E.2d 233 (Ill. App. Ct. 1991).

ment purposes since the school district had actual or constructive knowledge of the employment relationship.¹⁸⁷

State agency regulations must be in compliance with statutory language. A California State Board of Education regulation requiring school districts to conduct an annual search among certificated employees before employing a noncertificated employee was not authorized under the state statute authorizing minimum qualifications of temporary employees to supervise athletic activities. The regulation was beyond the scope of the statute and as such was void.¹⁸⁸

In a worker's compensation case the Supreme Judicial Court of Maine determined that a school teacher could recover only if "she experienced work stress that was extraordinary and unusual in comparison to pressures experienced by the average of all employees or in comparison to pressures experienced by the average employee performing the same job with similar duties." In this case, the teacher was able to recover because her mental injury was caused by pressures associated with her employment as a teacher in a program for gifted and talented children rather than disciplinary action taken by the school district.¹⁸⁹ In another worker's compensation case, a teacher was not entitled to worker's compensation because his heart attack which occurred while he was sitting in a recliner in his home eighteen hours after taking a teacher test was not causally related to the stress surrounding the test.¹⁹⁰

Several cases involved statutory interpretations and employee job assignments or transfer rights. In a case involving a West Virginia statute whereby applicants for education positions were to be considered primarily on the basis of qualifications with seniority having a bearing on the decision, the West Virginia Supreme Court upheld a school board's refusal to fill a vacant principalship with an applicant who had experience as both assistant high school principal and high school principal. In upholding the hiring of a candidate with only assistant high school principal experience, the court declared that the board could take into consideration the unsuccessful applicant's inability to explain parents' complaints regarding his handling of disciplinary problems while serving as principal.¹⁹¹ A tenured teacher, whose teaching assignments had been changed from six physical education classes to three physical education and three science classes, lost her right under state statute to claim that this assignment was a transfer when she failed to request a hearing before the school board.¹⁹² In an interesting case involving the interaction of a county civil service system and the right of a probationary employee to be returned to a position from which she had been

187. *In re Hodges*, 575 N.Y.S.2d 587 (App. Div. 1991).

188. *San Jose Teachers Ass'n v. Barozzi*, 281 Cal. Rptr. 724 (Ct. App. 1991).

189. *Caron v. Maine Sch. Admin. Dist. No. 27*, 594 A.2d 560 (Me. 1991).

190. *Mosley v. McGehee Sch. Dist.*, 816 S.W.2d 891 (Ark. Ct. App. 1991).

191. *Staton v. Wyoming County Bd. of Educ.*, 400 S.E.2d 613 (W. Va. 1990).

192. *Strong v. Alabama State Tenure Comm'n*, 583 So. 2d 273 (Ala. Civ. App. 1991).

granted a leave of absence, the New York Court of Appeals determined that the employee was required to be reinstated where civil service rules permitted probationary employees to be discharged only for incompetency, misconduct, or unsatisfactory work performance. Where none of those reasons had been asserted, the employee on an approved leave of absence to work at a second position was entitled to be reinstated after the second position had been eliminated.¹⁹³ Transfer of two teachers from the high school to other schools in the same school system because of persistent high student failure rates (22% to 61%) was not arbitrary in violation of the Kentucky Constitution. The teachers who had experienced no loss of pay or benefits were not able to prove a constitutionally improper reason for the transfer.¹⁹⁴

Several cases involved legal matters that were related to school employees because of statutory or judicial interpretations. A state statute which mandated that early retirement plans remain in effect for at least one year did not prohibit a local board through its collective bargaining agreement from requiring notification to participate in the plan at a point in time approximately two months before the year had expired, and thus an administrator who failed to meet the notification deadline could not participate, even though he had provided notice within the calendar year.¹⁹⁵ Under the Georgia Constitution, since the state legislature was not prohibited from granting an irrevocable exemption from state income taxation, a state law revoking the prior tax exemption of state retirement benefits was not unconstitutional.¹⁹⁶ In Indiana, the amount which an ex-husband had contributed to his deferred compensation plan was subject to garnishment by his former wife, but amounts contributed by the school were not wages and thus were exempt from garnishment.¹⁹⁷ In a case involving an employment grievance brought by a non-Indian principal on an Indian reservation, the South Dakota Supreme Court determined that state courts had no jurisdiction to resolve the grievance because of the tribe's sovereignty and federal preemption.¹⁹⁸

Tenure

"Tenure" is a statutory right to continuing contract status which also entitles tenured employees to procedural due process protection and to termination "for cause." Certificated personnel such as teachers and principals can acquire tenure in most states and noncertificated personnel can

193. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ'al Servs.*, 570 N.Y.S.2d 474 (Ct. App. 1991).

194. *Board of Educ. of Ashland v. Jayne*, 812 S.W.2d 129 (Ky. 1991).

195. *Finche v. Canton City Sch. Dist. Bd. of Educ.*, 581 N.E.2d 523 (Ohio 1991).

196. *Parrish v. Employees' Retirement Sys. of Ga.*, 398 S.E.2d 353 (Ga. 1990).

197. *Marriage of Wooten*, 563 N.E.2d 636 (Ind. Ct. App. 1990).

198. *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480 (S.D. 1991).

acquire tenure in some states. Some states permit teacher or administrator tenure to attach if a person moves vertically from one category to another, but in most states a probationary period must be served after any change in certificated category. It is more likely that certificated administrators will already be certificated teachers for purposes of vertical movement than vice-versa. Tenure transfer from one district in a state to another is controlled by state law.

Tenure Status

Tenure status frequently requires that certain conditions be met before an employee can acquire that status. A school bus driver who had been hired on an "as needed" basis on three successive one-year contracts was not entitled to continuing contract status at the end of the third year because she had not been hired exclusively as a replacement for a regular employee on leave.¹⁹⁹ A teacher who had worked virtually the entire school year for two successive years as a substitute for two different teachers on medical leave was not entitled to tenure. Under Iowa's interpretation of its tenure statute the teacher was a temporary substitute because she was paid on a *per diem* basis rather than a salary and for both years her service would have been ended had either or both teachers been able to return to teaching.²⁰⁰ In a Tennessee case, a superintendent was not entitled to tenure even though he had served the statutory period because he had failed to notify the school board that if he were reemployed after the probationary period he would attain tenure. Applying the Tennessee tenure statute applicable to teachers (superintendents are classified as teachers), attainment of tenure is dependent on a superintendent notifying a school board prior to reelection by the board that the superintendent, if reelected, will attain tenure status.²⁰¹

In an Ohio case, a teacher hired for three successive years under one-year limited teaching contracts became a continuing contract teacher under the state tenure act when the fourth year contract was offered. The teacher's acceptance of a limited contract stating that continuing employment depended on available funds did not constitute a waiver of her continued employment status.²⁰² On the other hand, the Alaska Supreme Court declared void and in conflict with state statute a Department of Education regulation that sought to grant tenure rights to teachers who had taught various fractions of school years, where the statute required that teachers must work "continuously for two full school years."²⁰³ Under the Alabama Teacher Pay Raise Act, female teachers who had taken maternity leave

199. Blair v. Milford Exempted Village Sch. Dist. Bd. of Educ., 575 N.E.2d 1190 (Ohio Ct. App. 1989).

200. Welk v. Iowa City Community Sch. Dist., 470 N.W.2d 57 (Iowa Ct. App. 1991).

201. Reeves v. Etowah City Sch. Bd. of Educ., 806 S.W.2d 176 (Tenn. 1991).

202. Mate v. Stow City Sch. Dist. Bd. of Educ., 575 N.E.2d 477 (Ohio Ct. App. 1988).

203. Fairbanks N. Star Borough Sch. Dist. v. NEA-Alaska, Inc., 817 P.2d 923 (Alaska 1991).

during their first three probationary years could have their tenure date delayed by the number of days leave, but they were nonetheless entitled to the statutory pay raise which became effective at the beginning of the fourth year.²⁰⁴

Certain unusual contract provisions may protect tenure status. A Minnesota 1990 statute eliminating superintendents from tenure as superintendents but not as teachers did not apply to a superintendent who chose in 1990 to continue service under his 1989 contract rather than accept a new contract offered in August 1990. Thus, as long as the superintendent continued under his existing contract without making new demands, he was covered by the tenure act as a superintendent.²⁰⁵

An employee's status under a state tenure statute may affect procedural rights. The Michigan Court of Appeals determined that the State Tenure Commission did not have jurisdiction to review the discharge of a tenured teacher whose certification had expired prior to the school board's vote to discharge her, because a person without a teaching certificate is not a teacher under state law.²⁰⁶ In Colorado, a teacher whose teaching certificate had expired was nonetheless still a "teacher" under the Teacher Employment, Dismissal, and Tenure Act entitling her to a board hearing prior to dismissal.²⁰⁷

Tenure can affect job assignment. A tenured teacher who had a New Jersey educational services certificate with speech correctionist and learning disabilities teacher-consultant (LTDC) was entitled to a newly created LTDC position over a nontenured employee because tenure attached to all positions for which the teacher was certificated.²⁰⁸ In another case from the same state, a school district violated a former guidance counselor's tenure rights when, following elimination of the guidance counselor position, it denied the counselor's application for a newly created position of class supervisor and preferred another applicant from outside the district who had never held such a position and who had no tenure in any position in the school district.²⁰⁹

Tenure by Default or Acquiescence

Acquiring tenure by other than the regular accumulation of the appropriate number of years of service is rare. A school administrator was entitled

204. *Board of Sch. Commissioners of Mobile County v. Ardis*, 575 So. 2d 1125 (Ala. Civ. App. 1990).

205. *Jurkovich v. Independent Sch. Dist. No. 708, Tower, Minn.*, 467 N.W.2d 360 (Minn. Ct. App. 1991).

206. *Cantu v. Board of Educ. of Grand Rapids Pub. Schs.*, 464 N.W.2d 900 (Mich. Ct. App. 1990).

207. *Frey v. Adams County Sch. Dist. No. 14*, 804 P.2d 851 (Colo. 1991).

208. *Ellicott v. Board of Educ. of Frankford, Sussex County*, 598 A.2d 237 (N.J. Super. Ct. 1991).

209. *Dennery v. Passaic Valley Regional High Sch. Bd. of Educ., Dist. No. 1*, 597 A.2d 559 (N.J. Super. Ct. App. Div. 1991).

to tenure after four years of continuous service, even though she did not have the requisite certification for the first two years because the school district did not believe at the time that certification was required. Where the school district disobeys the tenure law through no fault of the employee, "it is the school district, and not the teacher, that must bear the consequences."²¹⁰ However, a teacher who had been absent forty-four days on maternity leave could have those days added to her three-year probationary period which meant that board notice to the teacher was within the three-year period and that the teacher did not acquire tenure by acquiescence.²¹¹

Certification

Certification Standards

Certification refers to requirements determined by a state to be necessary to teach in certain subject matter areas. A California appeals court decided that a physical education teacher with a disability prohibiting her from teaching physical education was wrongfully denied disability payments when the California Teachers' Retirement Board decided that the teacher could use course credits earned twenty to thirty years earlier in sociology, world history, and comparative political systems to obtain teaching credentials in subjects other than physical education. The California Education Code clearly stated that teaching credentials had to be assessed on criteria other than mere course credits and where the teacher recalled none of the course content taken twenty to thirty years earlier she would not be entitled to teaching credentials in those fields and thus was entitled to disability payments. In addition, the court awarded attorney fees and court costs to the teacher because the Board's denial was clearly arbitrary and capricious.²¹²

Lack of correct certification can lead to harsh results. A tenured high school teacher certified to teach high school business and driver's education was suspended without pay in relation to charges that he had taught high school science without appropriate certification.²¹³

Decertification, Revocation, or Suspension

Revocation of teaching certificates raised constitutional, contractual, and procedural questions. The Louisiana Supreme Court has determined that the State Board of Elementary and Secondary Education (BESE) has authority under the state constitution, through a process of periodic teacher

210. *Nixon v. Board of Coop. Educ'l Servs. of Sole Supervisory Dist. of Steuben-Allegheny Counties*, 564 N.Y.S.2d 903, 905 (App. Div. 1990).

211. *England v. Commission of Educ. of N.Y.*, 564 N.Y.S.2d 809 (App. Div. 1991).

212. *Abshear v. Teachers' Retirement Bd. of Cal.*, 282 Cal. Rptr. 833 (Ct. App. 1991).

213. *Winter v. Board of Educ. for Rhinebeck Cent. Sch. Dist.*, 565 N.Y.S.2d 918 (App. Div. 1991).

evaluations, to revoke teacher certificates or place teachers on a one-year remediation certificate. The state constitutional provision prohibiting BESE from having the power to select or remove local school district officers and employees was a limit on BESE's powers other than supervision and control.²¹⁴ Teachers who had failed the Texas Examination of Current Administrators and Teachers (TECAT) resulting in invalidation of their teaching certificates had no cause of action for breach of contract because invalidation of teaching certificates automatically rendered the teaching certificates void.²¹⁵ In a case demonstrating the difference in admissible evidence between a court of law and an administrative hearing, a teacher's license could be revoked on the basis of admissions of sexual improprieties which male students made to a private investigator, even though the investigator had misrepresented to the teacher that the school district already had evidence of the improprieties.²¹⁶

214. *Eiche v. Louisiana Bd. of Elementary and Secondary Educ.*, 582 So. 2d 186 (La. 1991).

215. *Swanson v. Houston Indep. Sch. Dist.*, 800 S.W.2d 630 (Tex. Ct. App. 1990).

216. *Stedronsky v. Sobol*, 572 N.Y.S.2d 445 (App. Div. 1991).

2

BARGAINING

Charles J. Russo

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Introduction

For the first time in three years, the number of reported cases addressing collective bargaining and related labor relations concerns declined. Even so, a significant number of disputes were subject to litigation, including one ruling handed down by the United States Supreme Court. However, just as the Court's holding did little more than affirm existing precedent, no new trends emerged as the courts appear to be content applying established precedent in new and different factual settings. This chapter examines cases arising in K-12 settings; cases involving higher education are reviewed in Chapter 8.

Constitutional Issues

Continuing the trend of recent years, the largest number of cases involving constitutional issues in whole or in part addressed fair share agreements. In fact, seven of the twelve cases in this section involve fair share agreements; one case was over alleged religious discrimination in conjunction with bargaining; two dealt with union activities in a church-operated school; and the final two cases addressed freedom of speech and association.

Fair Share Agreements

Faculty members in a state college in Michigan who were not members of the faculty association brought suit claiming that the collection and use of fair share fees in an agency shop violated their First and Fourteenth Amendment rights. In *Lehnert v. Ferris Faculty Association*,¹ the Supreme Court affirmed the precedent established in *Abood v. Detroit Board of Education*.² It held that the dissenting faculty members could be charged a *pro rata* share of costs for union activities that are germane to collective bargaining even if these functions did not directly benefit the bargaining unit with which they were associated. The Court also ruled that chargeable expenses included costs incident to the preparation for a strike even though it would have been illegal under state law. However, it refused to permit the union to charge the dissenting nonmembers for costs associated with lobbying activities or litigation not concerning the bargaining unit.

The Seventh Circuit was called upon to hear another appeal based on the Supreme Court's decision in *Chicago Teachers Union, Local 1 v. Hudson*.³

1. 111 S. Ct. 1950 (1991). See THE YEARBOOK OF EDUCATION LAW 1990 at 40 and 221 for the history of this case.

2. 431 U.S. 209 (1977). See THE YEARBOOK OF EDUCATION LAW 1978 at 144 for a full discussion of this case.

3. 475 U.S. 292 (1982). See THE YEARBOOK OF EDUCATION LAW 1987 at 46 for a full discussion of this case.

which found a union's procedural scheme relating to fair share fees constitutionally defective. The circuit court⁴ affirmed the trial court's ruling⁵ that the revised scheme was adequate under the directives of *Hudson*. More specifically, it ruled that the fair share notice provided by the teachers' union to nonunion employees was constitutionally adequate even though there were alleged errors in the calculation of the fees since the notice provided nonunion members with sufficient information to challenge the fees.

Teachers who were not members of a union challenged the amount and validity of the agency service fee charged by the union that represented them for collective bargaining purposes. The Labor Relations Commission dismissed their claims. On further appeal, the Supreme Judicial Court of Massachusetts affirmed.⁶ It found that since the teachers lacked First Amendment and state constitutional rights to an independent audit of the union's breakdown of expenses in determining the agency service fee, they could not be granted relief.

In a set back for a local teachers' union, an appeals court in Oregon⁷ found the fair share provision in the operative collective bargaining agreement to be invalid. It ruled that the payroll deduction agreement between the union and the school district that exempted nonunion employees who worked fewer than fifteen hours per week was not a fair share agreement. In order to qualify as fair share, state law required all nonunion members to make payments in lieu of union dues.

Where the only issue was the amount of the service fee a union was entitled to collect and not whether the fee should be paid, an appellate court in Connecticut ruled that federal rather than state labor law applied.⁸ Consequently, the court refused to vacate an arbitration award upholding the deduction of union service fees from the salary of a nonunionized teacher. The court found that the award was proper because, pursuant to guidelines suggested by federal labor policy and procedure, it was rendered within a reasonably prompt period. In a case that took more than a year and one half to reach the reporters, a teachers' union was granted relief in its small claims action to collect a fair share fee from a teacher who was a member of the bargaining unit but not of the union. An Ohio court ruled that since the posting procedures employed by the union to notify nonmembers of their fair share fee and to provide information about the basis for the fee were adequate, the union was entitled to the fee.⁹ Thus, the teacher was required to pay even though he claimed that he neither observed the posted notice nor

4. *Hudson v. Chicago Teachers Union*, Local 1, 922 F.2d 1306 (7th Cir. 1991).

5. *Hudson v. Chicago Teachers Union*, Local 1, 708 F. Supp. 961 (N.D. Ill. 1988). See THE YEARBOOK OF EDUCATION LAW 1990 at 39 for a full discussion of this case.

6. *Belhumeur v. Labor Relations Comm'n*, 580 N.E.2d 746 (Mass. 1991).

7. *Bates v. Portland Fed'n of Teachers and Classified Employees*, 807 P.2d 306 (Or. App. 1991).

8. *Kilpatrick v. Connecticut Educ. Ass'n*, 584 A.2d 479 (Conn. App. Ct. 1991).

9. *Jefferson Area Teachers Ass'n v. NACSA*, 580 N.E.2d 534 (Ohio Misc. 1990).

received the financial disclosure package mailed to all teachers who were not members of the union.

The final case dealing with fair share fees is another Ohio ruling which experienced an even greater delay in publication than the previous decision. The court reversed and vacated a ruling of the State Employment Relations Board (SERB).¹⁰ It found that a local school board had no obligation to continue to deduct either fair share fees or dues for an employees' labor association after its collective bargaining agreement with the organization expired where the board based its decision on the good faith reasonable belief that the employees' labor association no longer represented the majority of the bargaining unit. The court also concluded that although the petition seeking to decertify the association was subsequently dismissed by SERB, the school board did not commit an unfair labor practice by reasonably relying on it.

First Amendment: Religion

A high school teacher brought suit under title VII alleging that the school board's negotiated policy of allowing only three days of paid leave for religious holidays but not allowing an equal amount of paid leave for necessary personal business for religious observance was discriminatory. On remand from the United States Supreme Court,¹¹ a federal district court¹² failed to find any violation of title VII. The Second Circuit affirmed.¹³ It concluded that the policy in the bargaining agreement was not discriminatory as administered with respect to conditions on account of religion because there was no evidence that paid leave could be taken pursuant to the necessary personal business provisions of the contract for all purposes except religious ones.

First Amendment: Bargaining and Church-operated Schools

After the State Bureau of Mediation Services certified a union as the exclusive bargaining representative for teachers in a Roman Catholic secondary school, the school appealed. An appellate court in Minnesota reversed on constitutional grounds.¹⁴ It held that the Bureau's application of the State Labor Relations Act in a dispute over the right of teachers in a

10. *New Miami Local Sch. Dist. Bd. of Educ. v. State Employment Relations Bd.*, 566 N.E.2d 201 (Ohio Comm. Pl. 1989).

11. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986). See *THE YEARBOOK OF SCHOOL LAW* 1987 at 7 for the history of this case.

12. The district court's opinion was not reported.

13. *Philbrook v. Ansonia Bd. of Educ.*, 925 F.2d 47 (2d Cir. 1991).

14. *Hill-Murray Fed'n of Teachers, St. Paul v. Hill-Murray High Sch.*, Maplewood, 471 N.W.2d 372 (Minn. Ct. App. 1991).

church-operated school to organize and bargain collectively violated the religious protection afforded by both the state constitution and the establishment and free exercise clauses.

A teacher in a Roman Catholic elementary school whose contract was not renewed after she refused to refrain from union organizing activity unsuccessfully petitioned the National Labor Relations Board and the State Labor Relations Commission to pursue an unfair labor practice charge on her behalf. Both declined on the ground that they lacked jurisdiction. The teacher then brought a breach of contract suit. Summary judgment in favor of the school was affirmed by the Supreme Judicial Court of Massachusetts.¹⁵ It found that when the teacher elected not to sign her contract at the customary time, the contract was neither renewed automatically nor was there a binding agreement between the parties. The court also concluded that there was no basis to the teacher's claim that the school's actions interfered with her rights to free speech and association in violation of the State Civil Rights Act.

First Amendment: Freedom of Speech and Association

A nontenured teacher brought suit against the school district alleging that her contract was not renewed when the district, acting under color of state law, violated her constitutional rights to freedom of speech and association, equal protection, and due process. The Montana Supreme Court reinstated her claims.¹⁶ It ruled that on the basis of the trial court's memorandum it was impossible to determine the exact reasons for the dismissal of her claims. The court also ordered further consideration of her allegations because it found that her complaint appeared to adequately set forth a claim for relief.

Where a teacher's union did not discover a former member's violations of its constitution and bylaws until after he had disavowed his membership status with the organization, a federal district court ruled that the union was justified in its decision not to prosecute him until after he rejoined it as an active member.¹⁷ Therefore, the court found no violations of his First Amendment rights to freedom of speech and association in the absence of evidence to support his claim that the union brought the charges as a pretext to eliminate his candidacy for its presidency or to punish him for differing views.

15. *Willits v. Roman Catholic Archbishop of Boston*, 581 N.E.2d 475 (Mass. 1991).

16. *Irving v. School Dist. No. 1-1A, Valley County*, 813 P.2d 417 (Mont. 1991).

17. *Ricks v. Simons*, 759 F. Supp. 918 (D.D.C. 1991).

Recognition and Representational Issues

There are three cases in this section. The first two deal with unit determination; the final case deals with the related issue of an election petition and union representation.

Unit Determination

After the State Board of Mediation and a trial court ruled in favor of secretaries who sought to join the same bargaining unit as the school principals and district department heads with whom they worked, the school district appealed. The Missouri Supreme Court affirmed.¹⁸ It ruled that since the Board's finding that the principals and department heads did not play such an important role in formulation, determination, and implementation of district labor relations policy was supported by substantial evidence in the record and was in accord with the state's statutory policy, there was no reason why the secretaries should be excluded from the same bargaining unit.

A local school district appealed a decision of the State Public Employee Labor Relations Board (PELRB) which permitted a nurse in an elementary school to become a member of a teachers' bargaining unit. The New Hampshire Supreme Court affirmed.¹⁹ It found that the decision was not unreasonable even though an earlier PELRB ruling had found another school nurse in the same administrative unit to be within the support staff bargaining unit rather than the teachers' bargaining unit. In this instance, the nurse shared the same community of interest in labor relations as the teachers, worked the same hours and annual schedule, had similar benefits, had a salary linked to the teachers' pay scale, was a certified professional employee under the supervision of the school principal, and had daily contact with parents, teachers, and children.

Elections

Acting on behalf of three tutors who sought membership in a school district's bargaining unit, a teachers' association filed unfair labor practice charges with the SERB when the district excluded the tutors from the bargaining unit. The SERB ordered a hearing to determine whether a representational question was present. The Supreme Court of Ohio affirmed.²⁰ It found that state law not only clearly authorized but also required

18. *Parkway Sch. Dist. v. Parkway Ass'n of Educ., Support Personnel PA-ESP*, 807 S.W.2d 63 (Mo. 1991) (*en banc*).

19. *In re Bow Sch. Dist.*, 588 A.2d 366 (N.H. 1991).

20. *State ex rel. Independence Local Sch. Dist. Bd. of Educ. v. State Employment Relations Bd.*, 580 N.E.2d 430 (Ohio 1990).

a hearing on an election petition when there was reasonable cause to believe that a representational question existed.

Rights and Obligations of Exclusive Bargaining Representatives

There are four cases in this section. The first case examines a union's right to act in its own name; the three remaining cases are concerned with a union's duty of fair representation.

Union Rights

After the association representing teachers in a school district requested a provision in the collective bargaining agreement permitting it to file a grievance in its own name, the district declared an impasse. The association dropped the request for the grievance provision but subsequently appealed to the State Public Employment Relations Board (PERB). The PERB found that the district had bargained in bad faith by declaring an impasse over a nonmandatory subject of bargaining. On further review, an appellate court in California ruled that as the certified exclusive bargaining representative of the district's employees, the association had a statutory right to file a grievance in its own name rather than in the name of a specific complaining employee.²¹

Obligations of Exclusive Representatives

A full time high school counselor whose assignment was changed to include part time teaching duties had her grievance denied by the school district. Consequently, she filed suit against the district alleging a breach of the collective bargaining agreement and against the union claiming that it breached its duty of fair representation by declining to pursue her grievance to arbitration. A trial court granted summary judgment in favor of the district on the ground that the State Employment Relations Commission (ERC) had exclusive jurisdiction over the counselor's complaint but entered a special jury verdict against the union. An appellate court in Michigan reversed and remanded, ordering judgment in favor of the union.²² It reasoned that where the school district was not in breach of the collective bargaining agreement at the time that the union decided against proceeding to arbitration, there were no issues of material fact on which it could find the union breached its duty of fair representation.

21. *South Bay Union Sch. Dist. v. Public Employees Relations Bd.*, 279 Cal. Rptr. 135 (Ct. App. 1991).

22. *Silbert v. Lakeview Educ. Ass'n*, 466 N.W.2d 333 (Mich. Ct. App. 1991).

A former junior high school teacher brought suit against his union alleging that it breached its duty of fair representation by failing to take proper action on his complaint that the acting principal of his school harassed him to the point that he decided to take early retirement. An appellate court in New York affirmed the dismissal of the teacher's charges.²³ It found that because the teacher failed to invoke administrative remedies available under the collective bargaining agreement, the factual allegations in his complaint did not support his contention that the union breached its duty of fair representation.

In a second New York case, thirty-five special education teachers brought suit against their union alleging that it breached its duty of fair representation when it permitted the school district to modify the collective bargaining agreement so as to provide a salary differential for some other special education teachers. An appellate court affirmed a judgment in favor of the union.²⁴ It reasoned that where there was a rational basis for a salary differential between teachers who ordinarily taught severely handicapped children and those who taught mildly or moderately handicapped children, the union had not breached its duty of fair and adequate representation.

Scope of Bargaining

The five cases in this section are concerned with the scope of collective bargaining. The first four cases are split evenly between mandatory and permissive topics of bargaining; the last case involves a prohibited topic of bargaining.

Mandatory Topics of Bargaining

As a result of a school district's refusal to bargain in good faith over proposed changes in teacher compensation, workload, and preparation time, the teachers' association filed an unfair labor practice with the Illinois Educational Labor Relations Board (IELRB). When the IELRB found that the changes in question not only constituted mandatory subjects of bargaining but that the parties had not waived the right to bargain further over the terms and conditions of employment, it ordered bargaining. The district sought further review and an appeals court affirmed.²⁵ It ruled that despite the district's contention to the contrary, the proposed changes did not maintain the status quo and, as such, were subject to mandatory bargaining.

23. *Goldstein v. Tabb*, 575 N.Y.S.2d 902 (App. Div. 1991).

24. *Litman v. Board of Educ. of N.Y.*, 865 N.Y.S.2d 93 (App. Div. 1991).

25. *West Chicago Sch. Dist. 33 v. Illinois Educ. Labor Relations Bd.*, 578 N.E.2d 232 (Ill. App. Ct. 1991).

Where a school district refused to bargain over a proposal which specified grade-by-grade class size limits, the Employment Relations Board ruled that as a matter relating to teachers' workloads, it was a mandatory subject of bargaining. An appeals court in Oregon affirmed.²⁶ It reasoned that since the proposal fit within the statutory provision relating to other conditions of employment, it was a mandatory subject of bargaining.

Permissive Topics of Bargaining

A decision of the IELRB that a school district failed to bargain in good faith by refusing to sign a collective bargaining agreement which included a teacher evaluation plan was reversed and remanded on judicial review. An appellate court in Illinois held that teacher evaluation plans are subjects of permissible collective bargaining, especially where the teachers' bargaining representative does not waive the right to bargain over the development of such a plan.²⁷ The court also found that the parties may agree to bargain over which portions of the plan are subject to the grievance and arbitration provisions of the collective bargaining agreement.

A state board of education concluded that a local school district's decision not to reappoint a teacher to his coaching position was a legally permissible topic of bargaining. An appellate court in Maryland affirmed.²⁸ It reasoned that since state law did not preclude negotiations over voluntary, nonscholastic, extracurricular activities and the state board's actions were neither arbitrary nor capricious, the removal of a teacher from his coaching position was a legal topic of bargaining.

Prohibited Topics of Bargaining

A teachers' association petitioned the state ERC for a determination as to whether part of a layoff and recall provision in a collective bargaining agreement with the school district was a prohibited and illegal subject of bargaining because it violated the constitutional rights of some teachers. The provision called for layoffs in inverse order of seniority as long as the racial balance of the schools was not disturbed; and, it produced hardships and actual injuries when white and hispanic members of the bargaining unit with more seniority were laid off rather than black members in order to preserve the overall percentage. The ERC's finding in favor of the association was vacated and reversed by a state trial court. On further review the ERC's decision was reinstated. An appeals court in Wisconsin reasoned that

26. *Tualatin Valley Bargaining Council v. Tigard Sch. Dist.*, 23J, 808 P.2d 101 (Or. Ct. App. 1991).

27. *Alton Community Unit Sch. Dist. No. 11, Counties of Madison and Jersey v. Educational Labor Relations Bd.*, 567 N.E.2d 671 (Ill. Ct. App. 1991).

28. *Board of Educ., Charles County v. Regala*, 589 A.2d 993 (Md. Ct. Spec. App. 1991).

because the ERC had the requisite jurisdiction to act, its finding that the provision was a prohibited subject of collective bargaining was not to be disturbed.²⁹

Grievability and Arbitrability

As in recent years, this is the largest section in the chapter. Cases are reviewed under "Presumption and Arbitrability" where the courts considered whether the underlying dispute was within the scope of the collective bargaining agreement or where they interpreted public policy relating to arbitration. Decisions are examined under "Who Determines" rather than "Judicial Review," where, regardless of the underlying dispute, the courts decided the jurisdictional question of the appropriate forum within which the dispute should be resolved. Opinions presented under "Procedural Issues" and "Managerial Prerogatives as a Bar" speak for themselves.

Presumption and Arbitrability

All but the final three of the twenty cases reviewed in this subsection uphold the general judicial presumption favoring arbitration as the means of resolving disputes over the interpretation of collective bargaining agreements.

In the first of two Florida cases, an arbitrator ordered the reinstatement of a continuing contract teacher to his position as band director where it found that he was not transferred for just cause. The school board appealed on the ground that state law vested authority in it alone to determine teacher assignments. An appellate court affirmed the arbitration award.³⁰ It reasoned that since it was not against public policy for a teacher who successfully challenged his reassignment under the appropriate grievance procedures to be returned to his previous position, the arbitration award was to be left standing. In the second case, a school board requested declarative and injunctive relief to prohibit the continuance of an arbitration proceeding relating to the nonrenewal of a teacher's contract. An appellate court in Florida reversed a trial court's ruling that no arbitrable issue existed.³¹ It held that the question of whether the teacher's nonrenewal was part of the staff reduction provisions of the collective bargaining contract or merely nonrenewal of an annual contract required interpretation of contract provisions. Thus the dispute was subject to arbitration.

29. *Milwaukee Bd. of Sch. Directors v. Wisconsin Employment Relations Comm'n*, 472 N.W.2d 553 (Wis. Ct. App. 1991).

30. *School Bd. of Seminole County v. Morgan*, 582 So. 2d 787 (Fla. Dist. Ct. App. 1991).

31. *Piercy v. School Bd. of Washington County*, 576 So. 2d 806 (Fla. Dist. Ct. App. 1991).

In the first of two Indiana cases, a teacher brought suit subsequent to an arbitrator's finding that a change in his schedule requiring him to teach classes other than those he preferred was not a reassignment in violation of the collective bargaining agreement. An appellate court affirmed.³² It reasoned that because the arbitrator acted within the scope of his authority in interpreting the contract, there could be no modification of his award.

An arbitrator determined that two additional jobs given to the individual chosen for a head basketball coaching position were subject to posting and negotiation rights under the collective bargaining agreement. The school corporation appealed, claiming that because the extra duties were supervisory and administrative in nature, the positions were exempt from posting; in addition, it argued that subjecting the jobs to arbitration involved unit determination. An appellate court in Indiana affirmed a judgment against the school corporation.³³ It reasoned that since the basic dispute was over contractual interpretation, the arbitration award was not beyond the realm of either public policy or statutory guidelines. The court also concluded that this was not a matter of unit determination.

A teacher who held dual certification as a school psychologist was bumped from her teaching position due to a realignment of the school district's professional staff. As a result of exercising her seniority rights, a series of bumps were set off, leading to the furloughing of a school psychologist. When the teacher rejected the district's offer of her choice of teaching assignments, the dispute proceeded to arbitration. The arbitrator found that nothing in the collective bargaining agreement prohibited a teacher from bumping into a psychologist's position, even if it meant the furloughing of a psychologist who had more seniority than teachers who were not being furloughed. As a result of this decision the school district filed suit. An appellate court in Pennsylvania affirmed.³⁴ It reasoned that where the parties negotiated the method by which employees were to be furloughed as a result of declining enrollment, the arbitrator's decision was not subject to reversal on judicial review since it drew its essence from the collective bargaining agreement.

In a second Pennsylvania case an arbitrator modified a school district's dismissal of a grounds keeper to a fourteen day suspension and the district appealed. The arbitrator's award was affirmed.³⁵ The court reasoned that since the award was derived from the collective bargaining agreement in

32. *Fort Wayne Educ. Ass'n v. Board of Sch. Trustees of the Fort Wayne Community Sch.*, 569 N.E.2d 672 (Ind. Ct. App. 1991).

33. *Eastbrook Community Schs. Corp. v. Eastbrook Educ. Ass'n*, 566 N.E.2d 63 (Ind. Ct. App. 1990).

34. *Allegheny Intermediate Unit v. Allegheny Intermediate Unit Educ. Ass'n*, 590 A.2d 1348 (Pa. Commw. Ct. 1991).

35. *McKeesport Area Sch. Dist. v. McKeesport Sch. Serv. Personnel Ass'n, PSSPA/PSEA*, 585 A.2d 544 (Pa. Commw. Ct. 1991).

light of the language, context, and other indicia of the parties' intentions, it could not substitute its own judgment for that of the arbitrator.

A teacher who claimed that she was transferred in reprisal for having filed an appeal of her performance evaluation brought suit when the school board rejected her grievance. A trial court's ruling in favor of the teacher was reversed and dismissed by the Supreme Court of Virginia.³⁶ It reasoned that where transfers were not defined as grievances within the meaning of the statute providing remedies for teachers' complaints, the lower court's ruling that her allegations were subject to a grievance procedure was in error.

In the first of five consecutive New York cases, an arbitrator found that a school district's involuntary reassignment of two special education teachers violated the collective bargaining agreement. An intermediate appellate court reversed in favor of the district and the teachers' association appealed. The New York State Court of Appeals reversed and reinstated the arbitration award.³⁷ It reasoned that the award, ordering the district to offer the teachers their original positions back, did not violate public policy, was not irrational, and did not exceed a specifically enumerated limitation of the arbitrator's power. The court also found that this remedy did not usurp a nondelegable power of the board of education.

A union representing custodians and bus drivers filed a grievance against a public school district alleging that it violated specific provisions of their collective bargaining agreement which remained in effect beyond the expiration date of the original contract. After the union refused the district's request to proceed to arbitration, the district filed suit. An intermediate appellate court found that the district was entitled to arbitration.³⁸ It held that although the expired bargaining agreement did not provide for arbitration and the subsequent agreement, which called for arbitration but had not been ratified at the time of the alleged grievance, there was no cause to stay arbitration. The court reasoned that where the parties' agreement to arbitrate is clear but there is some ambiguity as to whether the dispute is adequately covered by the terms of the contract, such a question is a matter of contract interpretation for an arbitrator to resolve.

A trial court in New York State rejected a board of education's request to stay the arbitration of a grievance over the discharge of a school district employee pursuant to Civil Service Law relating to reinstatement after separation for disability. On appeal, the judgment against the district was affirmed.³⁹ The court held that since the issue at the heart of the dispute was procedural in nature, it could be a subject of arbitration.

36. *Tazewell County Sch. Bd. v. Gillenwater*, 400 S.E.2d 199 (Va. 1991).

37. *Board of Educ., Arlington Cent. Sch. Dist. v. Arlington Teachers Ass'n*, 571 N.Y.S.2d 425 (N.Y. 1991).

38. *In re South Orangetown Cent. Sch. Dist. & Civil Serv. Employees Ass'n*, 570 N.Y.S.2d 409 (App. Div. 1991).

39. *In re Board of Educ., Greenburgh No. 11 Union Free Sch. Dist.*, 568 N.Y.S.2d 121 (App. Div. 1991).

A board of education appealed the denial of its request to stay arbitration of a union's grievance which challenged the board's placement of newly hired teacher aides on the salary scale. An appeals court affirmed the denial.⁴⁰ It ruled that where the collective bargaining agreement clearly provided union members with recourse to arbitration for violations of the express provisions of the contract, the union was entitled to arbitration.

In the final New York case in this subsection, a local Board of Cooperative Educational Services moved to stay arbitration of a grievance under the collective bargaining agreement it had entered into with its teachers. An appellate court affirmed a judgment denying the board's request for the stay.⁴¹ It reasoned that any ambiguity as to whether the employees at the board's alternative high school were teachers covered by the agreement was a matter of contract interpretation for an arbitrator to resolve.

A local school district in New Jersey obtained an order permanently enjoining arbitration of a dispute it had with the union representing its teachers over health insurance coverage and the union appealed. An appeals court reversed in favor of the union.⁴² It found that the union was entitled to arbitration when, due to the insolvency of the health insurance provider, the district was obligated to pay the teachers' medical bills. The court concluded that since health benefits were a term and condition of employment as defined by the collective bargaining agreement, the dispute was properly subject to arbitration.

An arbitration award ordered a board of education to submit the names of sixty-two teachers to the retirement board for inclusion into the city's retirement system. The school board succeeded in having the arbitration award vacated and the teachers' association appealed. The Supreme Court of Connecticut reversed and remanded with directions to render judgment confirming the arbitration award.⁴³ It held that the award was entitled to a presumption of validity and did not exceed the arbitrator's authority even though the retirement board was not a party to the arbitration contract. The court concluded that since the award could reasonably be construed to require the board of education to submit the names of the teachers to the retirement board with the nonbinding recommendation that they be enrolled in the retirement system, it would not disturb the arbitrator's ruling. In a second Connecticut case, a trial court granted a local board of education's petition to vacate an arbitration award which construed a contract to include longevity pay within the ambit of annual salary for the purposes of computing severance pay. An appellate court reversed in favor of the union.⁴⁴ It

40. *In re* Board of Educ., Cold Spring Harbor Cent. Sch. Dist., 568 N.Y.S.2d 122 (App. Div. 1991).

41. Board of Coop. Educ. Serv. v. BOCES III Faculty Ass'n, 563 N.Y.S.2d 456 (App. Div. 1991).

42. Board of Educ. of Bloomfield v. Bloomfield Educ. Ass'n, 598 A.2d 518 (N.J. Super Ct. App. Div. 1991).

43. Board of Educ. of Waterbury v. Waterbury Teachers Ass'n, 583 A.2d 626 (Conn. 1990).

44. Board of Educ. of Hartford v. Hartford Fed'n of Teachers, Local 1018, 591 A.2d 821 (Conn. App. Ct. 1991).

confirmed the arbitration award in its conclusion that the trial court improperly substituted its interpretation of a contract for that of the arbitrator.

A library media specialist in Colorado brought suit against her school district over the district's refusal to arbitrate a dispute over the interpretation of the transfer provision of the collective bargaining agreement in effect between the parties. The district asserted that since the transfer went to another media specialist who had previously filed a grievance in order to obtain the disputed position, all of the issues concerning the vacancy had been resolved. A trial court's ruling in favor of the district was reversed on appeal.⁴⁵ The court reasoned that since state policy was to refuse to compel bargaining only upon a showing that there was no agreement to arbitrate or if the issue raised was clearly beyond the scope of the arbitration provision and neither of these existed in the case at bar, her claim was subject to arbitration.

A teachers' association and the city cross-appealed a lower court's ruling that a proposed amendment to the city charter precluding binding interest arbitration was lawful for future collective bargaining agreements. The union challenged the validity of the amendment while the city sought to have interest arbitration in the current contract declared void as an unlawful delegation of authority. The Supreme Court of New Hampshire affirmed.⁴⁶ It ruled that binding interest arbitration was a lawful means of resolving disputes in the existing contract since there were appropriate statutory limitations on the discretion of arbitrators. However, the court also concluded that nothing in state law prohibits a municipality from excluding arbitration from future bargaining agreements.

The final three cases in this subsection resulted in judgments not supporting the general judicial presumption in favor of arbitration. In the first case an arbitral award ordering a school district to reinstate a school bus driver whose employment was terminated due to unsafe driving habits was reversed by an appellate court in Illinois.⁴⁷ The court ruled that the award was contrary to public policy favoring safe transportation of school children where the bus driver's driving habits were so poor as to put the lives of the children on her bus at risk.

A teacher whose petition to stay termination proceedings for just cause pending arbitration of her grievance relating to unfavorable teaching evaluations was denied. The Supreme Court of Iowa affirmed.⁴⁸ It reasoned that in the absence of language in the collective bargaining agreement clearly providing for arbitration of grievances over performance evaluations that resulted in a recommendation for the termination of a teacher's employment,

45. *Shorey v. Jefferson County Sch. Dist.*, No. R-1, 807 P.2d 1181 (Colo. Ct. App. 1990).

46. *City of Portsmouth v. Association of Portsmouth Teachers*, 597 A.2d 1063 (N.H. 1991).

47. *Board of Educ. of Sch. Dist. U-46 v. Illinois Educ. Labor Relations Bd.*, 576 N.E.2d 471 (Ill. App. Ct. 1991).

48. *Atlantic Educ. Ass'n v. Atlantic Community Sch. Dist.*, 469 N.W.2d 689 (Iowa 1991).

proceedings to terminate a teacher's contract for just cause took precedence over arbitration of the grievance.

After a physical education teacher who also served as a soccer coach was replaced as coach, his request for arbitration arising from the nonrenewal was rejected. An appellate court in Pennsylvania affirmed.⁴⁹ It held that since the teacher performed his coaching duties under a supplemental contract he was, as such, not an employee within the meaning of the arbitration clause of the collective bargaining agreement. Therefore, he was properly enjoined from proceeding to arbitration.

Who Determines

The first of the six cases in this subsection involved an Ohio ruling that took more than two years to reach the reporters. A school bus driver whose contract was not renewed by the school board brought suit claiming that because she was entitled to continuing contract status, her employment could not be terminated except for cause. A trial court's grant of summary judgment in favor of the board was affirmed.⁵⁰ An appellate tribunal found that the lower court had properly asserted jurisdiction despite the driver's failure to exhaust administrative remedies. It ruled that until a determination of the driver's contract status had been rendered, she had no rights under the collective bargaining agreement. Accordingly, the court reasoned that she could not have been compelled to proceed to arbitration since any arbitration she could have agreed to prior to the determination of her contract status would have been nonbinding and only binding arbitration of the dispute could have precluded the trial court's jurisdiction.

The collective bargaining representative for paraprofessionals in a school district filed charges of unfair labor relations practices with the SERB, alleging that the school board violated state law by discharging a union member on account of her union activities. The SERB dismissed the charge for lack of probable cause and an intermediate appellate court affirmed a lower court's dismissal for lack of subject matter jurisdiction. The Ohio Supreme court affirmed.⁵¹ It reasoned that because the SERB's determination whether to prosecute the charge was not an adjudication subject to judicial review, the courts lacked jurisdiction to act.

A nontenured teacher whose contract was not renewed simultaneously appealed the denial of her grievance and filed an unfair labor practices complaint with the State Department of Labor. The Department dismissed her grievance appeal but not the labor complaint. When a trial court

49. *In re Glover*, 587 A.2d 25 (Pa. Commw. Ct. 1991).

50. *Blair v. Milford Exempted Village Sch. Dist. Bd. of Educ.*, 575 N.E.2d 1190 (Ohio Ct. App. 1989).

51. *Ohio Ass'n of Pub. Sch. Employees, Chapter 643 v. Dayton City Sch. Dist. Bd. of Educ.*, 572 N.E.2d 80 (Ohio 1991).

dismissed the grievance for lack of jurisdiction and affirmed the Department's right to hear the labor complaint, both parties appealed. The Supreme Court of South Dakota affirmed.⁵² It ruled that because the district complied with state law by notifying the teacher of the reasons for her dismissal and its policy did not provide for the filing of a grievance, it would not erode the state statute which maintained that a school board's decision was not subject to judicial review. The court also upheld the Department's assertion of jurisdiction over her related unfair labor practices complaint.

After teachers in a school district successfully brought suit over their complaint that they were not provided with a duty free lunch period as required by state law,⁵³ the district appealed. It claimed that because the lunch assignment policy was a subject of the operative collective bargaining agreement, the IELRB had exclusive jurisdiction over the dispute. An appellate court in Illinois affirmed in favor of the teachers.⁵⁴ It reasoned that the prior appellate decision which found that a collective bargaining agreement could not provide for a lunch period in violation of state statutory provisions was controlling. Therefore the court concluded that because this was a dispute over statutory interpretation, the courts and not the IELRB had exclusive jurisdiction to hear the case.

A school board sought to reduce the town's operating expenses by substantially modifying the group health benefits it made available to its educational personnel. When the employees obtained declaratory and injunctive relief, the board appealed on the ground that the employees failed to exhaust administrative remedies. An appellate court in Massachusetts affirmed in favor of the employees.⁵⁵ It reasoned that where only questions of law appropriate for judicial review were present, where there were no disputed facts, and where there was no issue relating to the conduct of labor relations or the interpretation of the applicable collective bargaining agreement, this was an appropriate case for a court. Thus, it held that there was no reason for the employees to have exhausted administrative remedies before seeking judicial review.

A tenured employee of a school district who was suspended due to a decline in pupil enrollment filed a grievance with her first level supervisor and was ordered reinstated. Subsequently, neither party proceeded to the next stage of the grievance procedure and the district refused to reinstate her. The teacher filed an unfair labor practices charge with the Labor Relations Board which, in turn, ordered her reinstatement. A Pennsylvania court

52. *Jensen v. Bonesteel-Fairfax Sch. Dist.* No. 26-5, 473 N.W.2d 467 (S.D. 1991).

53. *Semmens v. Board of Educ. of Pontiac Community Consol. Sch. Dist.* No. 429, Livingston County, 546 N.E.2d 746 (Ill. App. Ct. 1989). See *THE YEARBOOK OF EDUCATION LAW 1991* at 48 for a full discussion of this case.

54. *Semmens v. Board of Educ. of Pontiac Community Consol. Sch. Dist.* No. 429, Livingston County, 574 N.E.2d 1341 (Ill. App. Ct. 1991).

55. *Ludlow Educ. Ass'n v. Town of Ludlow*, 575 N.E.2d 359 (Mass. App. Ct. 1991).

affirmed.⁵⁶ It reasoned that its review of the Board's decisions was limited to a determination of whether they were supported by substantial evidence and whether its legal conclusions were not arbitrary, capricious, or incorrect as a matter of law. Thus, the court found that where the bargaining agreement provided for the grievance process to serve as the final resolution of the dispute and the district failed to follow appropriate procedures in challenging the initial disposition of the grievance, the court lacked the jurisdiction to act.

Procedural Issues

Although they are often not dispositive, the procedural issues relating to arbitration hearings can have a significant impact on their outcome. The first of the four cases here deals with election of remedies; the next two cases are primarily concerned with the exhaustion of remedies doctrine; the final opinion examines the requirement that administrative decision making be based on a record.

A teacher who was denied tenure instituted arbitration proceedings against her district, contending that it breached its collective bargaining agreement by failing to properly follow the teacher evaluation process specified in the union contract. A trial court held that because the teacher elected to go to arbitration and, in fact, won her grievance, the election of remedies doctrine precluded her appeal to the State Commissioner of Education. An appeals court in New York reversed in favor of the teacher.⁵⁷ It ruled that the election of remedies doctrine did not prevent her from appealing to the Commissioner on the ground that she acquired tenure by estoppel since the issues in each forum were separate and distinct.

A teacher in a Roman Catholic secondary school filed suit alleging that the procedures under which she was notified that her contract would not be renewed due to budgetary constraints violated the operative collective bargaining agreement. After a trial court granted summary judgment in favor of the school, the teacher sought further review. An appellate court in Indiana affirmed.⁵⁸ It ruled that her action was subject to dismissal for failure to exhaust administrative remedies available under the bargaining agreement. The court also held that she was not entitled to have the matter remanded for arbitration since the record failed to show that she availed herself of the contractual conditions precedent to binding arbitration or that the school refused to arbitrate the dispute.

A teacher whose contract was not submitted to the board of education for approval brought suit against the school district. She claimed that it not only breached the collective bargaining agreement but also violated her civil

56. *Moshannon Valley Sch. Dist. v. Pennsylvania Labor Relations Bd.*, 597 A.2d 229 (Pa. Commw. Ct. 1991).

57. *England v. Commissioner of Educ. of N.Y.*, 564 N.Y.S.2d 809 (App. Div. 1991).

58. *Frieburger v. Bishop Dwenger High Sch.*, 569 N.E.2d 755 (Ind. Ct. App. 1991).

rights. After a dismissal in favor of the board, an appellate court in Colorado reinstated her claims.⁵⁹ It reasoned that the board had no ground on which to base its claim that the teacher failed to exhaust administrative remedies since it refused to process her grievance pursuant to its contention that she was not covered by the bargaining agreement. In addition, the court reinstated her section 1983 civil rights claim where material issues of fact concerning the reasons why her contract was not submitted to the board precluded summary judgment against her.

A school board in Florida denied a grievance by a district coordinator who sought to determine whether she was guaranteed a director's salary for the life of her multiyear contract or only for the first year. The coordinator appealed, charging that the board failed to issue any findings of fact or conclusions of law in denying her grievance. An appeals court agreed with her contention.⁶⁰ It found that while there was competent substantial evidence in the record that would have supported the board's decision, it was bound to follow appropriate procedures and make the necessary factual findings, supported by the record, that would sustain its decision.

Management Prerogatives as a Bar

As strong as the judicial presumption favoring arbitration is, disputes involving managerial prerogatives are routinely found to be beyond the scope of bargaining and arbitration. All three of the cases in this subsection reflect instances where courts found that decisions relating to the discharge of teachers were not subject to arbitration through the collective bargaining process.

An arbitration award calling for the reinstatement of a probationary teacher who claimed that the district failed to perform its evaluation in accord with the collective bargaining agreement was vacated. On further review an appellate court in California affirmed.⁶¹ In addition to finding that the bargaining agreement did not purport to establish procedures governing such a situation, the court ruled that where state law provides that the nonreelection of probationary teachers is within the sole discretion of the school district, the school board may not delegate its statutory duty to an arbitrator. However, the court did find that the arbitrator had the authority to order the district to stop violating the evaluation procedures.

A school district was granted a stay of arbitration where a teacher alleged that the transfer of students from his class without discussion handicapped him in the discharge of his duties. An appellate court in New York affirmed

59. *Norton v. School Dist. No. 1, City and County of Denver*, Denver Pub. Sch., 807 P.2d 1160 (Colo. Ct. App. 1991).

60. *Winbush v. School Bd. of Osceola County*, 585 So. 2d 465 (Fla. Dist. Ct. App. 1991).

61. *Bellflower Educ. Ass'n v. Bellflower Unified Sch. Dist.*, 279 Cal. Rptr. 179 (Ct. App. 1991).

the stay.⁶² It found that implicit in the statute charging school boards with the duty to provide for the instruction of pupils is the power reasonably necessary to exercise management and control of educational matters in the district. Concomitantly, it noted the existence of a strong public policy creating a nondelegable duty to maintain the standards within the classroom. Accordingly, the court concluded that the dispute over the composition of a class was barred from arbitration.

A school district brought suit seeking to vacate an arbitrator's award ordering the reinstatement of a semi-permanent teacher whose contract had been cancelled. An appeals court in Indiana reversed in favor of the district.⁶³ It ruled that legislative intent in the relevant statute bars a school board from delegating authority to an arbitrator to resolve disputes involving the dismissal of teachers. Thus, the court concluded that the discharge of a teacher may not be subject to binding arbitration under a collective bargaining agreement between a school board and a teachers' association.

Judicial Review

Judicial deference to arbitration notwithstanding, a significant number of disputes involving collective bargaining agreements, arbitral awards, and employment relations board rulings were subject to judicial review. The cases in this section are grouped in seven categories: salary and benefits; seniority rights; transfer; promotion; reduction-in-force; dismissal; and reinstatement.

Salary and Benefits

Where a school district made unequal salary payments to teachers with equal years of experience and training, a teachers' association filed suit seeking to compel the district to comply with the state law mandating payment on a uniform basis. After a trial court dismissed the action, an appellate court in California reversed and remanded.⁶⁴ It found that state law calling for uniform salaries took precedence over the collective bargaining agreement and could not be waived by contract. Thus, before ordering the district to reclassify the teachers, the court called for a hearing to determine whether there were any merits to the district's defenses against placing the aggrieved teachers on the appropriate salary step.

62. *Babylon Union Free Sch. Dist. v. Babylon Teachers Ass'n*, 563 N.Y.S.2d 453 (App. Div. 1990).

63. *Michigan City Educ. Ass'n v. Board of Sch. Trustees of the Mich. City Area Schs.*, 577 N.E.2d 1004 (Ind. Ct. App. 1991).

64. *California Teachers Ass'n v. Governing Bd. of Lancaster Sch. Dist.*, 280 Cal. Rptr. 286 (Ct. App. 1991).

Seniority Rights

A teacher who was placed on an unrequested leave of absence after a hearing officer found that he was on the same salary step as a less senior teacher sought judicial review. An appellate court in Minnesota reversed.⁶⁵ The teacher was reinstated where the court found that "step," within the meaning of the collective bargaining provisions for such a situation, was to be interpreted as years of experience plus years employed by the school district and not merely salary level.

Transfer

A school district filled three teaching vacancies that arose during the course of the school year with nonstaff applicants or first year teachers with less seniority than other staff members. The district admitted that while the staff members who were denied transfers into these vacancies were qualified, it hired other replacements in order to avoid a disruption of classes. After the State Department of Labor and a circuit court ruled in favor of the teachers, the district appealed. The Supreme Court of South Dakota affirmed.⁶⁶ It reasoned that since factors such as the disruption of classes and the impact the change would have on students were not included in the vacancy-transfer provisions of the labor agreement negotiated between the district and the teachers' association, they could not be considered in this situation.

Promotion

After a local board of education eliminated the position of department head rather than promote a teacher it believed to be unqualified, an arbitrator ordered the board to reinstate the position and to promote the teacher. The Supreme Court of Connecticut ordered the district to follow the arbitrator's determination.⁶⁷ It held that the board could not use its discretionary power to eliminate the position since by doing so it deliberately sought to bypass the grievance arbitration process in its collective bargaining agreement.

Reduction-in-force

An association representing teachers sought declaratory and injunctive relief to prevent a school district from laying off twenty-two teachers under the reduction-in-force provision of the operative collective bargaining agreement. After a trial court found that the board abused its discretion, an

65. *Fredrich v. Independent Sch. Dist. No. 720*, 465 N.W.2d 692 (Minn. Ct. App. 1991).

66. *Wessington Springs Educ. Ass'n v. Wessington Springs Sch. Dist.* #36-2, 467 N.W.2d 101 (S.D. 1991).

67. *Board of Educ., Thomaston v. State Bd. of Labor Relations*, 584 A.2d 1172 (Conn. 1991).

intermediate appellate court reversed. The Supreme Court of Ohio affirmed in favor of the district.⁶⁸ It concluded that in a conflict between state statutory provisions and the reduction-in-force provisions of the bargaining agreement, the language of the contract governed. Thus, where the school board authorized a reduction-in-force after reviewing enrollment patterns which indicated an 8% decline without any increases in over five years, it was in compliance with the provisions under which teachers could be discharged. The contract provided for the discharging of teachers only if there was a continuing decline in enrollments.

Dismissal

The association representing a maintenance worker who was discharged for habitual tardiness brought suit against the school district after the Employment Relations Board (ERB) found that the employee was discharged for good cause and that the district followed the agreed upon procedures prior to releasing him. An intermediate appeals court twice reversed and remanded,⁶⁹ and the district appealed. The Supreme Court of Oregon reversed and reinstated the ERB's decision.⁷⁰ It concluded that the school district acted properly where its predischARGE notices complied with the requirements of the administrative rule incorporated by the collective bargaining agreement that infractions be made in writing, dated, and a copy placed in the employee's personnel file with the original copy sent to the employee.

After a ruling by the IELRB concluded that a school district had improperly fired a secretary for requesting union representation at a meeting with school administrators, the district sought judicial review. An appellate court in Illinois reversed in favor of the district.⁷¹ It found that the secretary was not fired because of her request for representation. Rather, it held that she was properly dismissed due to her poor job performance, insubordinate behavior, and inability to work with others even after being warned.

Reinstatement

The first of the three cases in this subsection involved a suit brought by an assistant superintendent who sought to annul a school board's abolition

68. *Cuyahoga Falls Educ. Ass'n v. Cuyahoga Falls City Sch. Dist. Bd. of Educ.*, 574 N.E.2d 442 (Ohio 1991).

69. *Oregon Sch. Employees Ass'n, Chapter 89 v. Rainier Sch. Dist. No. 13*, 786 P.2d 1311 (Or. Ct. App. 1988). See THE YEARBOOK OF EDUCATION LAW 1991 at 58 for a full discussion of this case.

70. *Oregon Sch. Employees Ass'n, Chapter 89 v. Rainier Sch. Dist. No. 13*, 808 P.2d 83 (Or. 1991).

71. *Board of Educ., Peoria Sch. Dist. No. 150 v. State Educ. Labor Relations Bd.*, 581 N.E.2d 395 (Ill. App. Ct. 1991).

of her position. A trial court dismissed her suit as moot and an appellate court in New York affirmed.⁷² It found that because of her voluntary retirement, she could not have exercised her seniority rights under the collective bargaining agreement to be reinstated to a different position and to have her name placed on a preferred eligibility list for any similar vacancies that might have arisen.

A school district refused to reinstate a teacher with a continuing contract who sought to return from a valid leave of absence. After the Department of Labor and a trial court ordered his reinstatement, the district appealed. The Supreme Court of South Dakota affirmed.⁷³ It held that the teacher was entitled to reinstatement upon his return when positions for which he was qualified were open. The court also awarded him the difference between the salary he would have received if teaching in the district and the salary he actually received while his grievance was pending.

A probationary teacher who was denied tenure claimed that it was because of her participation in protected activity as part of her teachers' association. The PERB ordered her reinstatement with tenure and the school district sought judicial review. An appellate court in California affirmed.⁷⁴ It concluded that the PERB's reinstatement of the teacher, who would not have been denied tenure but for her exercise of her protected rights, did not impermissibly interfere with the district's authority to decide whether to grant tenure to a probationary teacher.

Impasse and Fact Finding

An impasse in bargaining between a school district and teachers' association over a salary and benefits package went to mediation and fact-finding. The board rejected the fact-finder's report and imposed a unilateral contract. An appeals court held that the board had the authority to impose such a contract but that it committed an unfair labor practice by certain reductions it made to the package.⁷⁵ The Supreme Court of Kansas affirmed in part and reversed in part.⁷⁶ It affirmed that while the issuance of a unilateral contract after negotiations were completed was not an unfair labor practice, the school board's reduction of its salary offer to its professional employees, after impasse procedures had been exhausted, by the full amount of expenses it incurred in mediation and fact-finding was a prohibited

72. *Girard v. Board of Educ., City Sch. Dist. of Buffalo*, 572 N.Y.S.2d 185 (App. Div. 1991).

73. *Rininger v. Bennett County Sch. Dist.*, 468 N.W.2d 423 (S.D. 1991).

74. *McFarland Unified Sch. Dist. v. Public Employment Relations Bd.*, 279 Cal. Rptr. 26 (Ct. App. 1991).

75. *Unified Sch. Dist. No. 279, Jewell County v. Secretary, Dep't of Human Resources*, 788 P.2d 867 (Kan. Ct. App. 1990). See *THE YEARBOOK OF EDUCATION LAW* 1991 at 61 for a full discussion of this case.

76. *Unified Sch. Dist. No. 279, Jewell County v. Secretary, Dep't of Human Resources*, 802 P.2d 516 (Kan. 1990).

practice. At the same time, the court reversed in part. It concluded that the teachers' association could receive reimbursement of the teachers' funds improperly withheld to pay for mediation and fact-finding even though the teachers had already accepted the unilaterally issued contracts.

Strikes and Sanctions

A school district sought to collect liquidated damages from eighteen teachers who failed to fulfill the terms of their employment contracts. The Department of Human Services found that this was not a prohibited labor practice. A trial court agreed that this was not a prohibited practice, but it enjoined the district from collecting the damages. An appeals court in Kansas affirmed in favor of the district.⁷⁷ It ruled that the board did not commit a prohibited practice in its attempts to collect damages from the teachers because even though it was unable to have a liquidated damages clause inserted in the collective bargaining agreement, it acted in a case by case basis when seeking damages from the teachers.

The parents of a first grade student filed suit on her behalf against teachers who participated in an illegal strike, alleging that the child suffered educational deprivation and emotional distress as a result of the strike. An appellate court in Indiana affirmed a dismissal of the complaint.⁷⁸ It ruled that a student could not maintain an action for damages against teachers who participated in an illegal strike where state law provided that the exclusive remedy for damages caused by such a strike can only be brought by a school corporation or a school employer.

As a result of a strike, a school district terminated the contracts of forty-two teachers and filed suit against them for tortious interference with contract. At the same time, the teachers brought an action for damages and reinstatement. When a trial court dismissed, on summary judgment, the district's claims and entered a jury verdict against the teachers, both sides appealed. An appellate court in Colorado affirmed.⁷⁹ It ruled that teachers who participated in an illegal strike could not be held liable to the district for tortious interference with the contracts of other teachers in the district since such a finding may be counterproductive to resolving labor disputes. The court also concluded that the teachers who were fired for participating in the strike were not entitled to relief in so far as the district had established constitutionally sound procedures to protect their due process rights prior to the district's review of their employment status.

77. *Garden City Educ. Ass'n v. Board of Educ., Unified Sch. Dist. No. 457, Garden City, Finney County*, 805 P.2d 511 (Kan. App. Ct. 1991).

78. *Coons ex rel. Coons v. Kaiser*, 567 N.E.2d 851 (Ind. Ct. App. 1991).

79. *Martin v. Montezuma-Cortez Sch. Dist. RE-1*, 809 P.2d 1010 (Colo. Ct. App. 1990).

Miscellaneous Decisions

While many of the cases in this chapter can fit into more than one section, some cases seem to defy classification altogether. Consequently, the following three cases examine issues that do not readily fit elsewhere in this chapter.

A teachers' association filed an unfair labor practice against a school district over the conduct of one of its principals. The principal made threatening remarks to association members and filed suit against them in connection with association related activities. The PERB failed to find an unfair labor practice and the association sought further review. An appeals court in California affirmed.⁸⁰ It concluded that the school district was not liable for an unfair labor practice committed by the principal where the association was unable to establish that the principal acted as an agent of the district.

A minority union and a school district brought cross appeals from a finding of the Public Employee Relations Commission relating to unfair labor practices charges brought by the union. An appeals court in Florida affirmed.⁸¹ It found that the school board did not commit an unfair labor practice by restricting the minority union's distribution of materials in a faculty lounge even though a copy of the incumbent union's newspaper was present; some teachers worked in the lounge and state law permitted restrictions on the distribution of union materials in work areas. However, the court did find an unfair labor practice where the district provided the incumbent union with space on a bulletin board but did not do the same for the minority union.

A teachers' union was awarded attorney fees after it successfully challenged a school district policy under which district staff members who had Acquired Immune Deficiency Syndrome (AIDS) or AIDS-Related Complex would be placed on sick leave or leave of absence. An appeals court in Wisconsin affirmed.⁸² It reasoned that since the union was the prevailing party, it was entitled to the attorney fees.

Conclusion

Since becoming a force in American education in the early 1960s, collective bargaining agreements have helped to establish the law of the land for courts and administrative review boards as they resolve labor disputes in educational settings. Moreover, as conflict over the meaning and implemen-

80. *Inglewood Teachers Ass'n v. Public Employment Relations Bd.*, 278 Cal. Rptr. 228 (Ct. App. 1991).

81. *American Fed'n of Teachers-Hillsborough v. School Bd. of Hillsborough County*, 584 So. 2d 62 (Fla. Dist. Ct. App. 1991).

82. *Racine Unified Sch. Dist. v. Labor and Indus. Review Comm'n*, 476 N.W.2d 707 (Wis. Ct. App. 1991).

tation of bargaining agreements is inevitable, a steady flow of new, if not unusual, cases is likely to continue for the foreseeable future.

What is perhaps a bit surprising is that in light of the stagnant condition of the federal and many local economies and their attendant budget deficits, the wave of labor strife that can be expected to accompany calls for deficit reductions by slashing funds for public education has yet to reach the courts. Given the speed at which labor disputes move through the various stages of resolution, it may take a while, but these cases will make their way to the judicial system before too long. And, when they do, they will provide a fertile source of material for future chapters on collective bargaining.

3

PUPILS

Henry S. Lufler, Jr.

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Introduction

Cases involving the rights of students to express religious beliefs in the public schools continued to increase sharply in number in 1991. The cases focused on the use of school facilities by student groups and the rights of students to distribute religious materials. Religious community groups also were involved in a number of suits when local school boards declined to provide them with space to hold activities. In other areas showing a high volume of litigation, courts continued to wrestle with the question of whether school systems had reached "unitary status," thereby relieving them of court supervision in desegregation cases, and student searches where drugs were found continued to be challenged.

Public School Assignment, Tuition, and Transportation

Tuition and Assignment

The United States Supreme Court ruled in 1982 that the children of parents residing in the country illegally could not be denied admission to the public schools.¹ In addition to deciding other issues, the Court in *Plyler v. Doe* reaffirmed the principle found in earlier assignment cases that children who do not move into a district principally for the purpose of attending school may not be denied tuition-free attendance. This purpose test was used by a Texas district court in a 1991 case involving a student who had fought violently with her mother and stepfather. The student subsequently moved in with her boyfriend's family, with the consent of her mother but without the execution of legal documents making the boyfriend's parents her legal guardians. A lawsuit was initiated when the boyfriend's school district would not admit the student. After considering the nature of the student's move into the district, the court held that it clearly was not made principally for the purpose of attending school.² The district was ordered to change its admission policy and to pay costs, fees, and nominal damages to be determined in a subsequent hearing.

A Pennsylvania state court considered a case of first impression involving the residence of children with divorced parents where joint custody was granted.³ The Pennsylvania school code provides that children may attend school where parents reside, but is silent on the residence of children with parents residing in two different districts. The child's mother, with whom the child was living, sought to enroll her daughter in the father's district. The child, however, remained domiciled with her mother. The court ruled that children of divorced parents may attend school only where they reside.

The Supreme Court of Mississippi held that the massive reassignment of students and the closing of several schools did not require a public referendum under Mississippi law.⁴ The court concluded that the reassignments did not constitute a district "reorganization," requiring a referendum, because no district boundaries were changed when the students were moved around within the existing district.

Home Instruction

Home instruction cases involve a clash of two competing interests, the obligation of the state to ensure that children receive a basic education and

1. *Plyler v. Doe*, 457 U.S. 202 (1982).

2. *Major v. Nederland Indep. Sch. Dist.*, 772 F. Supp. 944 (E.D. Tex. 1991).

3. *Mathias v. Richland Sch. Dist.*, 592 A.2d 811 (Pa. Commw. Ct. 1991).

4. *Citizens Involved in Consol. v. Wayne County Bd. of Educ.*, 574 So. 2d 619 (Miss. 1990).

the power of parents to select educational alternatives for their children. Courts generally find that states have substantial latitude to regulate home instruction, either by establishing credentials for those conducting the instruction or by periodic student assessment to ensure that those educated at home are learning. The key home-instruction cases in 1991 addressed parents' claims that regulations violated their substantive due process rights.

The Sixth Circuit Court of Appeals considered a Kentucky case addressing a seldom litigated home instruction issue—the power of school districts to give retroactive graduation credits for instruction received at home when a student seeks readmission to the public schools.⁵ Kentucky state regulations provide that a student may be asked by a local school district to pass an examination to receive the credit, or may be given the credit after successful performance in a higher level course when courses are sequential. In the case at hand, the student was required to follow the testing alternative. His parents filed suit, arguing that his equal protection rights had been violated because students transferring from private schools were given the course-sequence option. It also was argued that the student had a religion-based objection to equivalency examinations.

The court of appeals rejected both claims. Upholding a district court decision that there was a rational basis for having higher standards for returning home-instruction students than for private school students, the appeals court followed the lead of the Eighth Circuit which had reached the same conclusion in a similar case.⁶ The Sixth Circuit Court also rejected the student's free exercise of religion claim regarding the test requirement, relying heavily on the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*.⁷ In *Smith*, the Court held that "generally applicable, religion-neutral laws" that have the effect of burdening a particular religious practice need not be justified by a compelling government interest. Finding that the student's objection to testing fit the Supreme Court's *Smith* analysis perfectly, the student's federal claims were dismissed.

A superintendent in Pennsylvania sought to require more testing of a home-instruction student than was required by state statute. The parents of the child responded with a claim that their substantive due process rights had been violated. A district court agreed, but dismissed the case because the superintendent had not taken any action as the result of the parents' refusal to participate in the additional testing.⁸

Michigan courts continued to hear challenges to state statutes regulating home instruction. In the first of two cases, an appeals court heard an appeal remanded from the state supreme court that addressed a challenge to the

5. *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927 (6th Cir. 1991).

6. *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988).

7. *Employment Div., Dep't of Human Resources of Or. v. Smith*, 110 S. Ct. 1595 (1990).

8. *Stobaugh v. Wallace*, 757 F. Supp. 653 (W.D. Pa. 1990).

Michigan requirement that all home instruction be provided by state-certified teachers.⁹ The remand asked the lower court to consider whether the certification requirement represented the least restrictive means for ensuring that children received an adequate education at home. It was suggested in the remand that a test might be used in lieu of certification, but the appeals court refused to reach that issue. Observing that the defendant in the case at hand believed that all state authority was sinful, the court concluded that testing instructors would represent a similar burden on the defendant's religious beliefs.

In a second Michigan appeals court decision involving a case of long standing, the court concluded that state procedures for registering home programs constituted administrative rules that should have been promulgated using a public-hearing process.¹⁰ The court declined to comment on the other issues raised by the plaintiffs until the correct process had been followed.

Minnesota courts have held previously that the Minnesota Constitution has a distinctively stronger freedom-of-religion clause than that of the United States Constitution, requiring officials in that state to use the least restrictive means to regulate home instruction.¹¹ A 1991 case addressed the question of whether student testing represented the least restrictive alternative, but the issue was not reached because the appeals court found the lower court record to be inadequate.¹² The appeals court also directed the lower court to refrain from ordering the child to be removed from the parents' home pending the resolution of the case, an order that was the source of the original litigation.

Compulsory Attendance

Challenges to compulsory attendance statutes focus on the means employed by school districts to compel the attendance of pupils. In an interesting Seventh Circuit Court of Appeals decision, the use of attendance law as justification for prohibiting the playing of video games by minors under seventeen years of age during school hours was challenged.¹³ The Chicago ordinance was assailed as limiting First Amendment freedom of expression, with the City responding that the ban was a reasonable time, place, and manner restriction. Finding that the state had a compelling interest in ensuring that children attend school, the appeals court upheld the restriction, concluding that "it was hard to imagine" a more direct relationship between the regulation and Illinois truancy laws.

9. *People v. DeJonge*, 470 N.W.2d 433 (Mich. Ct. App. 1991).

10. *Clonlara, Inc. v. State Bd. of Educ.*, 469 N.W.2d 66 (Mich. Ct. App. 1991).

11. *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990).

12. *In re T.K.*, 475 N.W.2d 88 (Minn. Ct. App. 1991).

13. *Rothner v. City of Chicago*, 725 F. Supp. 945 (N.D. Ill. 1989), *aff'd*, 929 F.2d 297 (7th Cir. 1991).

Virginia's highest court considered a challenge to that state's statute that permits a religious exemption to school attendance by reason of "bona fide religious training or belief."¹⁴ The plaintiffs in the case argued that their local school board decision denying their request should be overturned because the board had advanced no reason for their denial. The Virginia court disagreed, holding that the record in the case demonstrated that the board had asked a series of questions to determine whether, in fact, the plaintiffs' religious views were sincerely held and more than a "personal moral code." The fact that the plaintiffs argued that their children would attend school "at the proper time" was advanced as partial justification for the court's decision.¹⁵ In another case, where parents' personal religious beliefs were used as justification for failing to fill out a form seeking a religious exemption, an Ohio court held that the parents could be prosecuted for failing to send their child to school.¹⁶

The Supreme Court of Colorado considered whether the legislature of that state could prevent judges from using their contempt powers to jail minors who were repeatedly truant.¹⁷ The minor who was the subject of the case repeatedly had refused court orders to attend school, offering as justification the fact that he was lazy and did not want to attend. In examining the legislature's ban on the use of contempt, the Colorado court concluded that the legislature had violated the separation of powers doctrine and that its statute therefore was unconstitutional. The contempt sentence was allowed to stand.

A New York appeals court heard a challenge to a local district rule that lowered grades when students missed school or cut classes without making up the work by attending detention.¹⁸ The plaintiffs unsuccessfully argued that the district lacked authority to promulgate the rule.

Transportation

The two 1991 transportation cases addressed quite different issues, with the first focusing on the constitutionality of a fee for bus service and the second challenging a twenty mile limit for the provision of transportation to a private school. A California appeals court weighed the question of the fee, which a number of districts had enacted. A lower court likened the transportation fee to a fee for extracurricular activities that the California Supreme Court previously had found to be in violation of the state constitutional provision that all children receive a free public education. In that case, the California court found that activities were an integral part of the

14. Va. Code § 22.1-257(A)(2) (1950).

15. *Johnson v. Prince William County Sch. Bd.*, 404 S.E.2d 209 (Va. 1991).

16. *State v. Wood*, 589 N.E.2d 484 (Ohio Ct. App. 1990).

17. *In re J.E.S.*, 817 P.2d 508 (Colo. 1991).

18. *Bitting v. Lee*, 564 N.Y.S.2d 791 (App. Div. 1990).

educational process.¹⁹ In the case at hand, the appeals court concluded that there was no educational component to a bus ride. If there were, the court reasoned, school districts would have to provide every student with one.²⁰ The court also found that the fee did not deny students access to an education because of low-income waivers that were a part of the system.

New Jersey law provides that private school students must be transported up to twenty miles to attend school. A local district declined to pay when it was determined that a student would be transported for more than that distance when the length of the school's driveway was included in the calculation. The matter was settled by an appeals court which ruled that the driveway should be included, since public school transportation eligibility was measured from a student's home to the door of the school attended.²¹

Private And Parochial Schools

Milwaukee's "choice" program, a state-funded experiment that gives low-income parents a voucher to be used at a variety of private schools, has been the subject of legal challenge filed by Wisconsin's state superintendent and a variety of educational interest groups. The challenge was mounted on a number of state and federal constitutional grounds. The first decision in the case, however, was decided on a collateral issue when a state appeals court held that the legislation creating the program was improperly adopted because it had been included in an omnibus budget bill.²² The legislation clearly affected only Milwaukee, where the program was to take place, and the state constitution requires that any "local bill" be passed as a separate issue.

A frequently litigated private school issue involves the liability for tuition payments faced by parents who withdraw their children from the school with which they had a contract. In some instances courts require the school to mitigate the damages by trying to find a replacement while in others parents have been held liable for the full amount even if a replacement is found. In a New Jersey case containing an exhaustive review of this litigation, a parent was held liable for the full sum, regardless of the replacement question, with the court holding that the clear language of the contract required that the payment be made.²³ A part of the court's analysis focused on the fact that the parent did not purchase the insurance that was offered to pay the tuition when last-minute decisions caused the student to be withdrawn.

19. *Hartzell v. Connell*, 201 Cal. Rptr. 601 (Cal. 1984).

20. *Arcadia Unified Sch. Dist. v. Department of Educ.*, 280 Cal. Rptr. 463 (Ct. App. 1991).

21. *Nelson v. Board of Educ. of Glen Ridge*, 587 A.2d 1327 (N.J. Super. Ct. App. Div. 1991).

22. *Davis v. Grover*, 464 N.W.2d 220 (Wis. Ct. App. 1990).

23. *Princeton Montessori Soc'y, Inc. v. Leff*, 591 A.2d 685 (N.J. Super. Ct. App. Div. 1991).

Substantive Rights of Students

Search and Seizure

Search and seizure cases continue to focus on attempts by school officials to respond to the sale and use of drugs in schools. Following the holdings of *New Jersey v. T.L.O.*,²⁴ courts use a reasonableness test to weigh the appropriateness of searches, considering all the circumstances that led to the decision. The *T.L.O.* decision continues to be at the heart of the legal reasoning employed by courts in search cases, and for the first time was used by a circuit court of appeals to analyze a strip search in a 1991 case. The strip search resulted after a student reported to her principal that she had seen the defendant handing another student a small brown vial containing a white powder. The defendant had been involved in previous reports of drug use at the school and her mother had even called the principal two days earlier to discuss the family's concern that their daughter was involved with drug use. Following the observation involving the white powder, the student's previously suspected drug involvement led the principal to bring her to the office. Once the student was in the principal's office and was confronted with the principal's suspicions, she produced a small bottle containing butyl nitrate, an inhalant banned in most states, that produces a short-term euphoria. Finding no white powder in the student's purse or locker, the search continued with the principal searching the student's clothing. No other drugs were found.

The student's father subsequently brought suit seeking damages for the search. The district court granted summary judgment to the district and the court of appeals affirmed.²⁵ The appeals court reviewed the accumulated set of circumstances involved in the case and concluded that it was reasonable for the principal to continue the search after the inhalant had been found. For the court, the finding of the inhalant paralleled the finding of rolling papers in *T.L.O.*'s purse that led to a further search in that case. The appeals court therefore upheld the dismissal of the damage claim.

A search of a thirteen-year-old Baltimore student's pocket by a security guard led to the discovery of twenty plastic bags containing heroin. Following a court decision adjudging the student to be delinquent, appeal was taken on the ground that the search was unreasonable. A Maryland appeals court disagreed, finding that a tip delivered by a student found to be in possession of cocaine on that same day was sufficient justification for the search.²⁶ The court also rejected an infancy defense that was offered, holding that the student had adequate knowledge of the offense he was committing.

A search of a Mississippi student's locker led to the discovery of a gun and a subsequent assignment to a term in a juvenile detention facility. The

24. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

25. *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991).

26. *In re Devon T.*, 584 A.2d 1287 (Md. Ct. App. 1991).

search followed a report from another student that he had been offered the chance to purchase a gun, and that the seller had two guns in his locker. The student's defense was based on the argument that state prohibitions against unreasonable searches were more rigorous than federal protection. While responding sympathetically to the state constitutional claim, the Mississippi Supreme Court nevertheless concluded that delays while a warrant was sought might have made it possible for the student to remove the guns from the school. The search therefore was upheld.²⁷

In another case that resulted in a court sentence, a student who claimed he was attending his grandfather's funeral was found to be in possession of drugs when the school principal discovered that there had been no death in the family. School officials searched the student's car and found marijuana and other evidence of drug dealing. The principal's suspicions were aroused during the previous week when the student was reported to have offered to sell drugs to another student. An appeals court found the search to be reasonable and upheld the conviction.²⁸

First Amendment Religious Rights

Numerous religious rights cases were reported in 1991. These cases fell into four general categories—challenges by religious groups seeking to use school facilities, litigation arising from the provision of remedial services to nonpublic school children, reviews of prayers at public ceremonies, such as graduations, and a group of cases alleging religious influences in the curriculum. As many of these cases involve unsettled areas of the law, there is little evidence that the number of cases in this section will be declining in coming years.

Two federal courts of appeal decisions addressed the question of whether school systems had created open forums through their past facility rental practices. It is well established that schools need not become open forums.²⁹ Once creating an open forum, however, school districts may not discriminate against religious groups seeking to use the space.³⁰ In a case reviewed by the First Circuit Court of Appeals, a Maine school district declined to permit an evangelical group to lease school facilities to provide a Christmas dinner.³¹ In looking at the district's past practices, the appeals court found such a wide range of previous renters it concluded that in school facilities "anyone could be promoted but Jesus." Citing the Supreme Court's

27. *S.C. v. State*, 583 So. 2d 188 (Miss. 1991).

28. *Coronado v. State*, 806 S.W.2d 302 (Tex. Ct. App. 1991).

29. See *United States v. Kokinda*, 110 S. Ct. 3115 (1990).

30. *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37 (1983).

31. *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45 (1st Cir. 1991).

holding in *Board of Education v. Mergens*,³² the appeals court found that the district's attempt to keep religion out of the facility actually represented a hostility toward religion, thereby violating the First Amendment. The decision by the district court ordering an end to the restriction was upheld.

The Second Circuit Court of Appeals considered another decision in the continuing litigation involving the use of a New York school auditorium by a religious group that wished to hold Sunday meetings.³³ The case appeared to have been settled when the appeals court upheld a district court order granting an injunction requiring the rental. The group using the facility continued the case against the New York education commissioner, however, arguing that a section of New York's education law previously used as a defense by the school district should be found unconstitutional. The appeals court declined to rule on this issue, holding that the group faced no current loss based on the disputed law and that therefore a live controversy was lacking.

The Second Circuit also heard a case arising from the decision by a school district to deny a "pro-life" religious group permission to use its auditorium for a fundraiser. Finding that the auditorium had been rented to a variety of groups, the appeals court upheld a district court summary judgment requiring the rental.³⁴ The court expressed its dismay that the school auditorium had been rented previously to another group for a Christmas program, a fact the district claimed not to be relevant because it did not know that there was a religious theme at the holiday event.

A Pennsylvania district court granted an injunction ordering a school to permit a religious group to use the school during the summer for a program aimed at economically disadvantaged children.³⁵ For the past twenty years, the Pittsburgh school had permitted the rental, but a new principal sought to change the practice. The court found that the change would contradict the district's past practice, which had the effect of creating an open forum for religious activities.

In a New York case, a district was found not to have created an open forum and the school district's decision not to permit the use of an auditorium for an evening Christian film series was upheld.³⁶ The district court refused to find that *Mergens* requires a school to rent space to religious groups. Other types of groups had been permitted to use the auditorium but the court concluded that a limited, not an open, forum had been created by the school.

32. *Board of Educ. of Westside Community Schs. v. Mergens*, 110 S. Ct. 2356 (1990) (upholding the Equal Access Act, 20 U.S.C.A. § 4071 *et seq.* [West 1985], that requires school districts with noncurriculum-related activity groups to make space available to religiously based student groups). See THE YEARBOOK OF EDUCATION LAW 1991 at 73.

33. *Deeper Life Christian Fellowship, Inc. v. Sobol*, 948 F.2d 79 (2d Cir. 1991).

34. *Travis v. Oswego-Apalachin Sch. Dist.*, 927 F.2d 688 (2d Cir. 1991).

35. *Youth Opportunities Unlimited, Inc. v. Board of Educ. of Sch. Dist. of Pittsburgh*, 769 F. Supp. 1346 (W.D. Pa. 1991).

36. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 770 F. Supp. 91 (E.D.N.Y. 1991).

In a case focusing on a student activity period, an Idaho district court applied *Mergens* and concluded that a school district could not deny students permission to form a Christian religious club. The court refused to consider arguments that the state's constitution regarding church and state should take precedence. The court did, however, complain about the loss of state sovereignty that the federal Equal Access Act implied. In another case that addressed the supremacy clause, a state of Washington district court went in the opposite direction, finding that the Act violated the Washington Constitution, and that it contained "no clear expression of congressional intent to preempt state law."³⁷

An Ohio school district assigned a less desirable time slot to a student Bible study club and was challenged in federal court. The district had two time periods for activities, with the earlier slot being the most desirable. In looking at the facts of the case, a district court found the school's decision to be reasonable, in part because the later period put more distance between the regular school day and the activity.³⁸ The club's advisor, a teacher at the school who had been cautioned for her actions in presenting religious messages to the fifth and sixth graders who were candidates for membership, was used as justification for the court's decision. The court reasoned that the establishment clause might be violated if school personnel were closely identified with the club.

Establishment clause issues are at the center of litigation involving the provision of chapter I³⁹ remedial services to low income students enrolled in parochial schools. It is generally settled that the publicly funded programs cannot be offered in parochial school classrooms without violating the establishment clause. Decisions in recent years, however, have divided on the question of the appropriateness of offering the services in trailers parked on private school grounds. Two 1991 cases examined the question.

The Eighth Circuit reviewed the use of portable classrooms used for chapter I services at 104 sites in Missouri.⁴⁰ The appeals court rejected the plaintiffs' arguments that the provision of chapter I services had a primary effect of advancing religion. A district court held that the classroom trailers must be parked off the parochial school grounds, and on that issue the appeals court reversed, finding that the classrooms would not be seen as being part of the private school even if they were located on their grounds. The appeals court also rejected the district court's use of per-pupil chapter I expenditures as the unit of analysis when addressing the issue of whether the program provided a direct benefit to the private schools. The appeals court concluded that comparable services were mandated, not comparable expenditures.

37. *Hoppock v. Twin Falls Sch. Dist.*, 772 F. Supp. 1160 (D. Idaho 1991); *Garnett v. Renton Sch. Dist.*, 772 F. Supp. 531, 537 (W.D. Wash. 1991).

38. *Quappe v. Endry*, 722 F. Supp. 1004 (S.D. Ohio 1991).

39. Chapter I of title I of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 2701-3386 (1988).

40. *Pulido v. Calvazos*, 934 F.2d 912 (8th Cir. 1991).

A California district court considered the same questions in a suit originating in San Francisco.⁴¹ In four instances, classrooms were parked on the grounds of parochial schools, either because nearby public sites were not available or were too distant. Parting company with the Eighth Circuit decision just reviewed, the California district court held that the "bright line rule" of requiring the trailers to be parked off the grounds of the private schools was the only way to avoid an establishment clause violation. The court reached the same conclusion as the Eighth Circuit on the issue of disproportionate spending for chapter 1 services in private schools.

Holding that "where the expenditure of federal tax money is concerned, there can be no distinction between foreign religious institutions and domestic," the Second Circuit held that federal funds could not be given to religious groups to run schools for Americans overseas.⁴² In particular, plaintiffs in the case challenged the use of funds for eleven Israeli schools and nine Roman Catholic schools in the Philippines. In holding that the federal program to aid such schools violated the establishment clause, the appeals court also suggested that a compelling interest test might be used to overcome the establishment clause objections when federal assistance was provided for schools in countries where there was no secular educational system. The court suggested that in such instances portions of programs might be supported.

The constitutionality of prayer at graduation ceremonies continues to be argued. The Supreme Court's decision in *Weisman v. Lee*,⁴³ awaited with interest, should clarify the question. The case presents the Court with two clear perspectives from which to build an opinion. The majority in the First Circuit decision used the traditional "test" found in *Lemon v. Kurtzman*⁴⁴ to determine if there was an establishment clause violation and concluded that the prayers had the primary effect of advancing religion. A dissenting judge held the opposite, concluding that such prayers were secular in nature, merely serving to solemnize the occasion. The Supreme Court also is presented with an interesting school policy to review in *Weisman*, with the school district having used a rotating series of invocation speakers, including those who presented a religious message and those who did not.

In a case decided in 1991, the Fifth Circuit was presented with a challenge to a school policy that permitted students to offer "nonsectarian, nonproselytizing" prayers at commencement.⁴⁵ Using *Lemon*, the appeals court concluded that the policy had a secular purpose (i.e., the "solemnizing" effect), neither advanced nor limited religion, and did not entangle government with religion. In a concurring opinion upholding the policy, two of the

41. *Walker v. San Francisco Unified Sch. Dist.*, 761 F. Supp. 1463 (N.D. Cal. 1991).

42. *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991).

43. *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I. 1990), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

44. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

45. *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991).

judges on the panel suggested that the *Lemon* test was "the highest hurdle" that a commencement prayer policy would have to jump, but they refused to reach the question of whether a less restrictive test might not properly be applied to commencement invocations.

Commencement prayers also were at issue before a district court in Utah, with the policy in question requiring "nondoctrinal, nonproselytizing" prayers representing "diverse views."⁴⁶ The district court compared the policy to that upheld by the Fifth Circuit in the case just discussed and reached the same conclusion, adding that ceremonial prayers at high school ceremonies should be compared to invocations given prior to legislative sessions, upheld by the Supreme Court in *Marsh v. Chambers*.⁴⁷

In a lengthy decision, the Supreme Court of California examined the question of graduation prayers and concluded that the challenged district prayer policy failed two prongs of the *Lemon* analysis.⁴⁸ In applying the test, the California court majority found that the prayers conveyed the message that the school district favored the religious beliefs expressed by the speakers and that the process of selecting the commencement speakers impermissibly entangled the district in religious matters. The decision also went to substantial lengths to conclude that the practice also violated the "no religious preference" clause of the California Constitution. In a concurring opinion, one judge carried the state issue further, arguing that the California charter "compels the same result." Two dissenting opinions also were filed.

In addition to the issue of prayers at commencements, a related group of cases focused on the practice of holding baccalaureate services for graduating seniors. These events present a separate set of facts, with attendance seen as more "voluntary" than for the commencement ceremonies themselves. Also, the services often present issues similar to the space-rental cases previously discussed. In one such case, a school board cancelled its annual baccalaureate ceremony, having concluded that it violated the Eleventh Circuit's findings in a decision that voided invocations prior to the start of high school football games.⁴⁹

Proving that there sometimes is no way to avoid a lawsuit, the school district then was challenged by a local church for having cancelled the ceremony. The district court compared the situation to that presented in *Mergens*, also finding that the district had created an open forum in its rental of the school auditorium to local groups, thus compelling the school to rent to the church wishing to hold the baccalaureate service.⁵⁰ Distinguishing the

46. Albright v. Board of Educ. of Granite Sch. Dist., 765 F. Supp. 682 (D. Utah, 1991).

47. Marsh v. Chambers, 463 U.S. 783 (1983) (prayers before the start of legislative sessions "are embedded in the history and tradition of this country" and do not violate the establishment clause).

48. Sands v. Morongo Unified Sch. Dist., 281 Cal. Rptr. 34 (Cal. 1991).

49. Jager v. Douglas County Sch. Dist., 862 F.2d 824 (11th Cir.), cert. denied, 490 U.S. 1090 (1989).

50. Verbenia United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala. 1991).

case at hand from the football prayers, the court found that those attending the service were not a "captive audience," like those at in a stadium, and could choose whether they wished to attend the optional Sunday night ceremony. The court also commented with favor on the steps the district had taken to distance itself from the event by not participating in its organization.

A New York district court refused to grant an injunction to stop a school district from sponsoring a baccalaureate service for graduating seniors.⁵¹ While school officials had run the program in the past, the legal challenge mounted against the service led to several changes, including a diversification of program speakers and the sponsorship of the program by an independent group. These changes led the court to view the issue as a space rental question, concluding that the school auditorium was an open forum and that the program should be allowed to continue.

In a continuing case involving a challenge to Illinois' statute calling for the daily recitation of the Pledge of Allegiance, summary judgment was granted to the defendants.⁵² The plaintiffs were atheists who argued that the statute was mandatory and that their son was subjected to great embarrassment when he sought not to participate. The court disagreed, finding that the statute's wording did not include the word "all," when referring to the participation of students in the pledge, thereby rendering participation voluntary. In addition, the court found that the plaintiff failed to show that his son had been subjected to any coercion, direct or indirect, to participate.

The Tenth Circuit Court of Appeals reviewed a decision made by a district court in Denver that involved a school district order to a fifth grade teacher to keep the Bible off his desk and to refrain from reading it during an open-reading period.⁵³ On appeal, parents of children at the school sought damages and the teacher argued that his free speech rights had been abridged. In reviewing the teacher's conduct in the reading period, the appeals court considered the totality of the experience the students received, including the fact that a poster behind the teacher urged readers to "open their eyes to see the hand of God." The court also noted that the teacher had never offered a nonreligious justification for keeping the Bible on the desk, or for repeatedly reading it during the silent reading period. Having affirmed the school district's desire to avoid sponsoring religion, the appeals court turned to the question of damages, finding that none of the parents had sufficient standing to pursue such a claim. Costs were, however, given to the defending school system.

In another case involving the Bible, an Indiana district court found reasons why the establishment clause did not prohibit the distribution of Bibles to fifth grade students. The Bibles and other religious materials were

51. *Randall v. Pegan*, 765 F. Supp. 793 (W.D.N.Y. 1991).

52. *Sherman v. Community Consol. Sch. Dist. 21 of Wheeling Township*, 758 F. Supp. 1244 (N.D. Ill. 1991).

53. *Roberts v. Madigan*, 702 F. Supp. 1505, *aff'd*, 921 F.2d 1047 (10th Cir. 1990).

distributed in classrooms while teachers monitored the process.⁵⁴ The distribution was made by the Gideon Society and was a practice of long standing in the district. No parental permission was sought. In reviewing the case the court first concluded that the *Lemon* test had "evolved" and now required courts to consider, generally, whether the practice being challenged would be seen by a reasonable observer as an endorsement or disapproval of religion. Using this approach, the policy was seen to pass the *Lemon* requirement of having a secular purpose, because "[i]ts purpose was not wholly religious and may have been wholly secular."⁵⁵ Finally, the court concluded that the school's involvement was "merely incidental" and did not constitute excessive entanglement.

In another unusual case involving the distribution of religious materials, several students ultimately ran afoul of school officials when they repeatedly distributed religious tracts in the hallways of their school during the course of the school day. While school officials permitted the distribution of some nonschool materials outside the cafeteria, they argued that they had never contemplated turning their hallways into a public forum. In response, the plaintiffs asserted that the school's policy limiting the distribution constituted prior restraint. Finding that federal appeals courts had yet to address the question of the distribution of religious literature during the school day, the court fashioned its own analysis from a series of free speech and establishment clause precedents, holding that there was reason to anticipate that interference with the operation of the school would occur if the distribution continued.⁵⁶ The court, however, asked the parties for additional arguments on the point, while strongly hinting that some compromise on the time-and-place issue might be reasonable.

State mandated AIDS education in New York continued to be challenged when a school boards' association challenged the required inclusion of religious organization representatives on local advisory councils.⁵⁷ An appeals court found that the requirement did not violate the establishment clause, holding that such recognition had only an incidental effect of advancing religion.

First Amendment Freedom of Expression

A decision not to permit advertisements sponsored by Planned Parenthood in high school yearbooks, newspapers, and athletic programs was again appealed in 1991. A district court and a Ninth Circuit Court of Appeals panel previously had held that the school system had not created a public forum for

54. *Berger ex rel. Berger v. Rensselaer Cent. Sch. Corp.*, 766 F. Supp. 696 (N.D. Ind. 1991).

55. *Id.* at 705.

56. *Slotterback ex rel. Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280 (E.D. Pa. 1991).

57. *New York State Sch. Bds. Ass'n v. Sobol*, 570 N.Y.S.2d 716 (App. Div. 1991).

advertisers in its publications.⁵⁸ Following its decision, the Ninth Circuit agreed to rehear the case sitting *en banc*. The disputed advertisements contained the address of Planned Parenthood and a list of the services it provided.

In looking at the obligation of the district to run the advertisements, the latest Ninth Circuit opinion used *Hazelwood School District v. Kuhlmeier*⁵⁹ as the focal point for its analysis. *Hazelwood* involved the deletion of two stories from a high school newspaper which the principal felt were inappropriate. The Court's decision in the case gave school officials broad powers to control the content of publications bearing the school's imprimatur. For the Ninth Circuit majority, control over advertisements in school publications fell squarely under the powers granted by the Court in *Hazelwood*. While Planned Parenthood argued that the court should follow an open forum analysis and examine the other advertisements permitted in the publications, the majority disagreed, observing that the students in *Hazelwood* could not have circumvented their school principal by running their stories as advertisements.

In dissent, four members of the court found that the advertisement was rejected only because it was "controversial" and not because anyone would somehow associate the advertisement as being sanctioned by the school. In looking at the other Las Vegas advertisers in the publications, the minority found over 100 advertisements, including those for casinos, bars, churches, political candidates, and the United States Army. Only Planned Parenthood was rejected. Those in dissent argued that the indiscriminate sale of advertising created an open forum, requiring the showing of a compelling state interest for any ad rejected. Avoidance of controversy would not, for those in dissent, represent such an interest.

Sanctions for Student Misconduct

Students and their parents continued to file lawsuits seeking admission of their children to honorary societies, arguing that their exclusion violated procedural or substantive due process rights. Students filing such suits ground their claims with arguments that previous controversies with school officials over disciplinary or other in-school events inappropriately led to their rejection. Courts continue to refuse to find that students have liberty or property rights that are implicated when membership in honorary groups is rejected. As an Alabama district court put it, "a person must have more than an abstract need or desire for . . . membership." In the case, a student who was ranked low by teachers on such subjective criteria as "character" and

58. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 887 F.2d 935 (9th Cir. 1989).
See THE YEARBOOK OF EDUCATION LAW 1990 at 77-8.

59. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

"attitude" was denied membership in a Beta Club. The court held that the student had no entitlement to membership, making it impossible for her to claim constitutional violations for her denial.⁶⁰

In a case raising different issues, a New York student claimed that he was rejected for membership in the National Honor Society because his father had been an outspoken critic of the school system.⁶¹ This transformed the case into a First Amendment challenge. A district court refused the school system's request for summary judgment, holding that an evidentiary hearing was necessary on the father's claim. Following the hearing, a jury hearing the case decided in favor of the district in all respects and the judge concluded that the father's claim was "factually baseless." This left the question of fees. With the district court judge noting that the case represented an example of persons "attempting to elevate mere personal desires into constitutional rights," the court held that \$60,000 in school district attorney fees must be paid by the plaintiffs.⁶²

Suspensions and Expulsions

Procedural due process issues are the source of most cases involving exclusionary discipline, with attorneys for students arguing that the procedures used were faulty. Most of these claims fail, with most school districts following procedures that meet the requirements established by the Supreme Court in *Goss v. Lopez*.⁶³ In *Goss*, the Court required that students being suspended for ten days or less be provided with a rudimentary hearing that essentially affords them the opportunity to tell their version of the incident in question before suspension. Expulsion and long-term suspensions require more due process. Other suspension and expulsion procedures are contained in state statutes or rules.

Questions about how far a school's disciplinary system reaches were raised in several 1991 suspension and expulsion cases. A California appeals court considered the expulsion of a student for an offense that occurred on a different campus from the one at which the student was enrolled.⁶⁴ The student used a stun gun in an altercation, and the county school board concluded that he could not be disciplined because the state code required that the misconduct be at a student's school or at a school activity. The court disagreed, finding that the code was broad enough to imply that misconduct at any school, not just the one the student attended, could be punished by expulsion.

60. *Moore v. Hych*, 761 F. Supp. 112 (N.D. Ala. 1991).

61. *Dangler ex rel. Dangler v. Yorktown Cent. Schs.*, 771 F. Supp. 625 (S.D.N.Y. 1991).

62. *Dangler v. Yorktown Cent. Schs.*, 777 F. Supp. 1175 (S.D.N.Y. 1991).

63. *Goss v. Lopez*, 419 U.S. 565 (1975).

64. *Fremont Union High Sch. Dist. v. Santa Clara County Bd. of Educ.*, 286 Cal. Rptr. 915 (Ct. App. 1991).

An after-school fight led to a one semester expulsion of several students and a subsequent lawsuit. Counsel for the students alleged that the penalty was so severe that it violated the substantive due process rights of the students. In one of the rare instances where such a claim succeeded, an Illinois appeals court agreed, finding that the plaintiff in the case merely was "in the wrong place at the wrong time" and had fought in self defense. The court found that the student's participation in the fight did not rise to the same level as the carrying of guns to school or selling drugs, both of which were punished by the same penalty as the plaintiff received. The court upheld the injunction a lower court had awarded and ordered the plaintiff readmitted.⁶⁵

In a case that also addressed the question of the boundaries of the school discipline system, a juvenile court judge declared unconstitutional a school district policy that automatically led to the expulsion of a student for one year when the student was found with a gun at school. The judge also ordered the student who had been found with the weapon to be readmitted to school. The school district then filed suit against the juvenile court. Massachusetts' highest court found itself with the task of determining the boundary between the juvenile justice and educational systems.⁶⁶

The court concluded that the juvenile court had other options for securing an education for the child under its protection, short of ordering the juvenile readmitted. For example, the court could have ordered the school district to provide a special needs assessment and individualized instruction. The Massachusetts high court then held that juvenile court judges do not have the jurisdictional power to declare school policies unconstitutional.

An Indiana case also involved the expulsion of a student who was under the supervision of a juvenile court.⁶⁷ The student had been caught drinking on school grounds. During the expulsion hearing process it was learned that the student had been sexually molested, and a juvenile court concluded that the drinking episode may have represented a "cry for help." Under this set of circumstances, the appeals court decided that the student need not exhaust her administrative appeal rights before applying for an injunction to be readmitted to school.

The question of how much due process is required before suspension or expulsion was argued in several cases. An Illinois student was suspended for twenty-seven days before being transferred to another school when it was found that he had brought a knife to school. An Illinois court found that he received an informal *Goss* hearing before his suspension and two formal hearings since that time, one at which he was represented by counsel.⁶⁸ This, the court concluded, was ample due process.

65. *Robinson v. Oak Park and River Forest High Sch.*, 571 N.E.2d 931 (Ill. Ct. App. 1991).

66. *School Comm. of Worcester v. Worcester Div., Juvenile Court Dep't*, 575 N.E.2d 1120 (Mass. 1991).

67. *In re P.J.*, 575 N.E.2d 22 (Ind. Ct. App. 1991).

68. *Draper v. Columbus Pub. Schs.*, 760 F. Supp. 131 (S.D. Ohio 1991).

In a Georgia case the offense alleged to have been committed was most unusual.⁶⁹ A student was suspended for three days for failing to clean the remains of a dead bug she had crushed from the trousers of her band instructor where the body had landed. A Georgia appeals court found that the student had received an adequate *Goss* hearing.

In a New York case, a court refused to find that a student who had been suspended for insubordination had a right to open his suspension hearing to the public.⁷⁰ The student's attempt to argue that the hearing officer in the suspension case was biased because he was compensated by the school district also was rejected. In a Texas case that also involved claims of a biased school employee, a student was unsuccessful in convincing a district court that the presence of a school security guard when he was found with drugs required that the case be prosecuted as a criminal violation.⁷¹

An Ohio court was asked to decide whether a school district needed to have a definition of "under the influence" in its school rules.⁷² Students who had consumed alcohol at home before joining the school band at an event were suspended when the drinking incident became known. A lower court held that some behavioral impairment was needed before someone could be said to be "under the influence," but the appeals court disagreed, holding that the sip at home before the school event was covered by the school rule.

Corporal Punishment

The boundary between corporal punishment and assault was crossed in a Pennsylvania case. A private school principal was convicted of assault when he paddled a first grade student an estimated fifty or sixty times after the child misbehaved. The penalty was carried out when the child appeared "rebellious and unrepentant." Given the facts in the case, the appeals court found that the punishment fit the definition of "extreme pain" prohibited by the state corporal punishment statute.⁷³ The court upheld the principal's one-year probation sentence and the requirement that he perform 150 hours of community service.

Desegregation

School desegregation cases reported in this section usually involve the form and timing of racial desegregation in metropolitan school districts. In a 1991 case of a different sort, a Michigan district court considered a challenge to the Detroit School Board's plan to create three all-male

69. *Wayne County Bd. of Educ. v. Tyre*, 404 S.E.2d 809 (Ga. Ct. App. 1991).

70. *Dimele ex rel. Dimele v. Potter*, 575 N.Y.S.2d 738 (App. Div. 1991).

71. *Salazar v. Luty*, 761 F. Supp. 45 (S.D. Tex. 1991).

72. *Rohrbaugh v. Elida Local Bd. of Educ.*, 579 N.E.2d 782 (Ohio Ct. App. 1990).

73. *Commonwealth v. Douglass*, 588 A.2d 53 (Pa. Super. Ct. 1991).

academies, each serving 250 boys from preschool through the fifth grade.⁷⁴ The academies were designed to provide at-risk students with a special curriculum, extended hours, Saturday classes, and a regimented structure which included the wearing of school uniforms. The plaintiffs asked the court for an injunction to stop the program's implementation, arguing that it violated the state and federal constitutions and a variety of federal acts, including title IX of the Education Amendments of 1972.⁷⁵ The Detroit Board asserted that the special problems faced by African-American males in Detroit warranted the creation of the gender based program. On this issue the court disagreed, holding that there was no evidence that it was the presence of girls in the existing school programs that had led to the high failure rate of males. As to the title IX claim, the court deferred to the Federal Office of Civil Rights interpretation that single sex public schools violate the terms of the title. The court issued an injunction halting the program.

Cross-district Remedies

Cases involving cross-district remedies focus on which units of government or which school districts will supply the funds to pay for desegregation plans and on the specific implementation requirements that should be required of each entity. Collateral issues sometimes intrude, with new parties seeking to enter the litigation or with existing parties contesting the award of fees. In a case containing all of these components, the Eighth Circuit Court of Appeals continued in 1991 to monitor the progress of desegregation in Kansas City. In the first Kansas City case it heard, the Eighth Circuit reviewed five district court slip opinions and affirmed all five, covering such issues as the district court's requirements concerning the timing of Missouri's payments to fund the plan and the state's obligation to pay for asbestos removal in the schools.⁷⁶

In a separate strand of the Kansas City litigation, the state sought an order requiring the local district to raise property taxes in order to fund its share of the desegregation remedy. The state's claim was based on an interpretation of the Supreme Court's ruling in *Missouri v. Jenkins*,⁷⁷ which the state claimed required the payment of a fixed percentage of the cost, regardless of the property tax increase necessary to reach that sum. The Eighth Circuit, however, disagreed with this interpretation of the Court's decision, pointing out that the Court was reviewing a decision that established the local share with two modifiers. The district was to pay one quarter of the costs, subject to "some reasonable limitation" and after considering the property tax rates in surrounding districts. The state's insistence on the payment of the

74. *Garrett v. Board of Educ. of Sch. Dist. of Detroit*, 775 F. Supp. 1004 (E.D. Mich. 1991).

75. 20 U.S.C. § 1681 *et seq.*

76. *Jenkins ex rel. Agyer v. Missouri*, 931 F.2d 470 (8th Cir. 1991).

77. *Missouri v. Jenkins ex rel. Agyer*, 495 U.S. 33 (1990).

district's full share would cause local school taxes to double. In addition, the state sought repayment of more than \$100 million that it had previously paid to supply part of the district's costs. The Eighth Circuit, in reviewing the state's reading of the Court's 1990 decision, held that the state's position was "untenable" and "legally frivolous."⁷⁸ The appeals court concluded that the state's obligation to pick up a portion of the local share was well established throughout the litigation.

The state continued to be the focus of Eighth Circuit attention, arguing in yet another Kansas City case that the appeals court had set a limit of \$150 million as the maximum state contribution for the 1991-92 school year. Upon reaching that point, the state attempted to defer all additional payments to the district until after the start of the next fiscal year. While the appeals court had used the \$150 million figure in a previous case, the court held in this latest appeal that the figure was intended to be an "approximation" and not a cap.⁷⁹ The court, however, recognized the state's problem in funding the additional sum during the current fiscal year. Recognizing that to send more money to Kansas City, the state would have to make sharp cuts in other programs, the appeals court ordered the state to provide the district with a bridge loan to be repaid with state funds in the new fiscal year.

The state of Missouri also sought to avoid funding certain components of the Kansas City desegregation plan by arguing that it should not send additional funds to support new magnet schools which would open with percentages of minority students higher than those targeted by the plan. The state attempt to "demagnetize" these schools was rejected by the district court in a slip opinion and this action was upheld by the Eighth Circuit.⁸⁰ The idea that the magnet plan should be scrapped because it failed to meet its goal in the first year was rejected by the appeals court, which held that the district court had not abused its power when it slightly modified the plan in the face of changing enrollments.

Finally, in a collateral action filed by a new group seeking to file suit against Kansas City, the Eighth Circuit held that the appellants should instead file a motion to intervene in the ongoing litigation.⁸¹ The group had argued that the relief they sought, funding for minority students to attend private schools, was a separate issue, but the appeals court held instead that the plaintiffs were seeking to modify the existing desegregation order. Just because the plaintiffs thought the existing plan was inadequate, the court reasoned, was not sufficient justification for the independent action.

Litigation concerning desegregation in Little Rock continued, with the Eighth Circuit reviewing two district court decisions which rejected a settlement agreement and declined to award the attorney fees agreed to by the

78. *Jenkins ex rel. Agyei v. Missouri*, 943 F.2d 840 (8th Cir. 1991).

79. *Jenkins ex rel. Agyei v. Missouri*, 949 F.2d 1052 (8th Cir. 1991).

80. *Jenkins ex rel. Agyei v. Missouri*, 942 F.2d 487 (8th Cir. 1991).

81. *Rivarde v. Missouri*, 930 F.2d 641 (8th Cir. 1991).

parties.⁸² The settlement reached by the state, county district, and local district involved over \$100 million in funds supplied by the state to support the plan components, including magnet schools. The district court rejected the settlement as "facially unconstitutional" because the state funding required approvals that might not later be obtained and because a number of segregated elementary schools were created by the plan. The appeals court reversed, observing that state funding had later been guaranteed and that an acceptable level of desegregation was provided in the plan as a whole.⁸³ The appeals court emphasized that ongoing monitoring of the plan gave the district court the chance to ensure that the payments were received and used appropriately. The appeals court also approved the payment of more than \$3,000,000 in attorney fees and expenses.

The district court hearing the Little Rock case next was faced with a request from the parties to modify their settlement plans.⁸⁴ The court refused to approve these changes, holding that they fell outside what the court considered to be the narrow limits for changes established by the Eighth Circuit in the previously discussed case. All parties appealed. While holding that there was great agreement between the district and appeals courts, the appeals court again reversed, holding that the lower court interpretation of the changes that might be permitted was too strict.⁸⁵ The appeals court listed seven areas in which "no retreat" would be permitted, including the double funding for students attending the incentive schools and the operation of magnet schools on a proscribed timetable. The case then was returned to the district court for hearings on the changes.

Litigation continued at its usual brisk pace in the dispute involving the desegregation of St. Louis area schools. One of the monitoring decisions faced by the district court in recent years has concerned the provision of vocational education to a dwindling number of students expressing an interest in the program. Reversing its position taken one year earlier, the district court early in 1991 concluded that only one such school was needed in the metropolitan area.⁸⁶ Finding that the city vocational school had "failed miserably," the court chose the county operated school as the one that would survive. This decision was appealed to the Eighth Circuit where it was upheld and "strengthened" by the addition of a variety of specific funding and program management requirements.⁸⁷

82. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 716 F. Supp. 1162 (E.D. Ark. 1989), and 726 F. Supp. 1544 (E.D. Ark. 1989). See THE YEARBOOK OF EDUCATION LAW 1991 at 83-4.

83. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 921 F.2d 1371 (8th Cir. 1990).

84. *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 769 F. Supp. 1483 (E.D. Ark. 1991), and 769 F. Supp. 1491 (E.D. Ark. 1991).

85. *In re of Little Rock Sch. Dist.*, 949 F.2d 253 (8th Cir. 1991).

86. *Laddell v. Board of Educ. of St. Louis*, 758 F. Supp. 499 (E.D. Mo. 1991).

87. *Board of Educ. of St. Louis v. Missouri*, 936 F.2d 903 (8th Cir. 1991).

The district court overseeing desegregation in St. Louis also decided a number of disputes related to magnet schools, capital improvements, and state funding for these plan components.⁸⁸ On an issue disputed vigorously by the parties, the court required the state to pay for costly asbestos removal in a number of antiquated schools. The state argued unsuccessfully that some of the removal was not needed. On the other hand, the court also rejected the city's attempt to put some capital projects unrelated to the standing orders in the case on the list of projects to be paid for by the state.

A 1990 court approved settlement among several parties in the Fort Wayne desegregation case did not include the state of Indiana.⁸⁹ The state then asked for summary judgment dismissing all outstanding claims related to its role. The district court declined to grant this motion, holding that there were substantial issues of fact that remained in dispute.⁹⁰ The court also dismissed the state's Eleventh Amendment immunity claim, observing that *Milliken v. Bradley*⁹¹ gave courts the power to order states to participate in remedial programs where state action had caused segregation.

Desegregation Plan Oversight

Confusion over the standards that courts should use to decide if a school district has reached unitary status has increased in the last decade. Federal circuit courts of appeal have reached differing conclusions about the criteria that should be applied to determine if a school district should be removed from judicial supervision. Some circuits have held that a district can be declared unitary if it has satisfied a district court that the school components listed in *Green v. New Kent County School Board*⁹² have been fully desegregated for a fixed number of years.⁹³ The Tenth Circuit, on the other hand, held that even after a district court declared a system to be unitary and had ceased its supervision, the district was still subject to the original desegregation decree.⁹⁴ This meant that the case could be reopened without a showing by the plaintiffs in the case that the local district had engaged in new actions that caused segregation.

88. *Liddell v. Board of Educ. of St. Louis*, 771 F. Supp. 1493 (E.D. Mo. 1991), 771 F. Supp. 1496 (E.D. Mo. 1991), and 771 F. Supp. 1503 (E.D. Mo. 1991).

89. *Parents for Quality Educ. with Integration, Inc. v. Fort Wayne Community Schs.*, 728 F. Supp. 1373 (N.D. Ind. 1990).

90. *Parents for Quality Educ. with Integration, Inc. v. State*, 753 F. Supp. 733 (N.D. Ind. 1990).

91. *Milliken v. Bradley*, 433 U.S. 267 (1977).

92. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968). (In judging if a school district should be removed from judicial supervision a court should decide if a district has been desegregated in a variety of areas, including student and staff composition, transportation, extracurricular activities, and facilities.)

93. *Spangler v. Pasadena City Bd. of Educ.*, 611 F.2d 1239 (9th Cir. 1979); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir. 1986).

94. *Dowell v. Board of Educ. of Okla. City Pub. Schs.*, 906 F. Supp. 1548 (W.D. Okla. 1985), rev'd, 795 F.2d 1516 (1986), cert. denied, 479 U.S. 938 (1986).

The United States Supreme Court finally addressed the question of unitary status when *Board of Education of Oklahoma City v. Dowell*⁹⁵ reached it again in 1990. Following the Tenth Circuit's remand of the case to the district court in 1986, the lower court held hearings to determine if the school district's student reassignment plan (SRP) had led to increased segregation. The district court concluded that present residential segregation was the result of private economic decisions and was only remotely related to former school segregation.⁹⁶ The court also failed to heed the Tenth Circuit's instruction to place the burden of proof on the school district to show that its SRP had not caused segregation. On appeal, the Tenth Circuit again held that the school district had remained under court supervision and overturned the district court.⁹⁷ The Supreme Court reversed.

Setting the stage for its analysis, the Court observed that, "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination."⁹⁸ Observing that the school district was in compliance with the 1972 injunction until 1985, the majority found this fact to be "obviously relevant." At the same time, however, the majority concluded that the meaning of the 1977 court order declaring the district to be unitary was unclear and refused to overrule the Tenth Circuit conclusion that the district court had not terminated the case. The Court remanded the case to the district court with instructions to determine whether the school district had complied in good faith with the original decree and whether it had eliminated segregation "to the extent possible." If the decree is lifted, the Court instructed the district court to decide whether new actions by the school district in implementing the SRP were taken with segregative intent.

Writing for the three person dissent, Justice Marshall viewed the case as one in which the school district was attempting to return many schools to their former one-race status. While the district court might wish to modify its original decree to make it less burdensome on the school district, those in dissent concluded that it was still in force. The dissent characterized the decree as a "slight burden" on the system "compared with the risk of not delivering a full remedy to the Afro-American children in the school system."⁹⁹

Dowell was used by the Fifth Circuit in its analysis of the ongoing desegregation dispute in Austin.¹⁰⁰ The plaintiffs in the case argued that a new pupil assignment plan proposed by the Austin district would lead to

95. *Board of Educ. of Okla. City Pub. Schs., Indep. Sch. Dist. No. 89 v. Dowell*, 111 S. Ct. 630 (1991).

96. *Dowell v. Board of Educ. of Okla. City Pub. Schs.*, 677 F. Supp. 1503 (W.D. Okla. 1987). See THE YEARBOOK OF EDUCATION LAW 1989 at 90-1.

97. *Dowell v. Board of Educ. of Okla. City Pub. Schs.*, 890 F.2d 1483 (10th Cir. 1989).

98. *Board of Educ. of Okla. City Pub. Schs., Indep. Sch. Dist. No. 89 v. Dowell*, 111 S. Ct. 630, 637 (1991).

99. *Id.* at 648.

100. *Price v. Austin Indep. Sch. Dist.*, 729 F. Supp. 533 (W.D. Tex. 1990), *aff'd*, 945 F.2d 1307 (5th Cir. 1991).

further segregation and asserted that though the district had been declared unitary the burden was on the district to show that the plan would not increase one-race schools. The Fifth Circuit disagreed, finding that the burden was on the plaintiffs to show that the board intended to discriminate. While noting that *Dowell* does not choose a "correct" definition of unitariness, the appeals court concluded that therefore the case left intact the previous definitions of "unitary" used in the circuits. Because the Fifth Circuit previously had held that a finding of unitary status shifts the burden to the plaintiffs, the lower court decision was allowed to stand.

The Fifth Circuit also considered an appeal of a lower court ruling in a Mississippi case that argued whether the state had permitted pupil transfers that contributed to segregated schools.¹⁰¹ While finding that the state had approved annexations and student transfers from a mostly black city school district to a mostly white county system, the lower court refused to order the consolidation of the two systems. The appeals court affirmed, finding that enrollment data did not prove that significant white flight had occurred. The presence of the NAACP as a party to the case urging that consolidation not occur and data suggesting that the mostly black schools were "objectively superior" played a part in the court's decision. Attempts by the NAACP to secure fees as a plaintiff were rejected, with the appeals court concluding that the district court had reasonably found that the group was, in fact, a defendant.

A Boston teacher's union continued the litigation in that city's desegregation case, arguing before the First Circuit that the district court should not have retained jurisdiction over the racial composition of teachers dismissed by the system as the size of the district's workforce was reduced.¹⁰² The appeals court upheld the lower court, finding that *Dowell* was authority for a lower court to look at "all facets" of school operations in considering whether final unitary status had been reached. The First Circuit did, however, delete two words in the lower court order to clarify that court supervision of school staffing would end when the minority teacher workforce could withstand a 3% reduction brought on by declining enrollments without dropping below one-quarter of the total.

Finally, litigation continued concerning desegregation in Wilmington, Delaware.¹⁰³ In almost every year, the district court has reviewed the plans by several districts and the state to bring about desegregation, with little progress being made. In the most recent case, the court characterized the response of one district as "defiant." The court went on to craft a lengthy order which it hoped would "remove most of the latitude for bad faith" on the part of the recalcitrant local board. The order covered the details of a student choice plan that involved several districts and the state board.

101. *United States v. State*, 719 F. Supp. 1364 (S.D. Miss. 1989), *aff'd*, 921 F.2d 604 (5th Cir. 1991). See THE YEARBOOK OF EDUCATION LAW 1990 at 88.

102. *Morgan v. Burke*, 926 F.2d 86 (1st Cir. 1991).

103. *Coalition to Save Our Children v. State Bd. of Educ.*, 757 F. Supp. 328 (D. Del. 1991).

4

INDIVIDUALS WITH DISABILITIES

Allan G. Osborne, Jr.

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Introduction

In October 1990 Congress passed and President Bush signed P.L. 101-476, the Education of the Handicapped Act (EHA) reauthorization bill!¹ Under the new legislation the EHA was retitled the Individuals with Disabilities Education Act (IDEA).² The amendment also changed some of the terminology that refers to those who are covered by the Act. For example, under the new legislation the term *students with disabilities* has replaced the term *handicapped children*. The title of this chapter and the terminology used herein have been revised to reflect the intent of the reauthorization bill. The courts in 1991 were inconsistent in their references to the law; however, for the sake of consistency the title IDEA will be used in this chapter regardless of which title a given court may have used.

Litigation over the rights of students and school employees with disabilities continued at a significant pace in 1991. Much of the litigation involved procedural issues, particularly regarding the conduct of administrative and judicial proceedings. Substantive issues, such as the appropriate placement of special education students in the least restrictive environment, also were frequently litigated. For the first time in several years the recovery of attorney fees by prevailing parents was not one of the most frequently litigated issues.

Litigation concerning the rights of employees with disabilities in programs receiving federal financial assistance under section 504 of the Rehabilitation Act³ also continued at a significant level. In a majority of these cases the employees sought to show that they were otherwise qualified for particular positions and could perform the essential functions of the positions if given reasonable accommodations.

Entitlement to Services

IDEA requires school districts to provide students with disabilities with a free appropriate public education (FAPE), consisting of any needed special education and related services.⁴ However, it does not establish any specific substantive standards by which those services can be judged to be adequate. The Act provides that the student is to be provided with specially designed instruction⁵ in conformance with the student's Individualized Education Program (IEP).⁶ The Supreme Court has held that a student with disabilities is entitled to personalized instruction with support services sufficient to

1. 104 Stat. 1103 (1990).

2. 20 U.S.C. § 1400 *et seq.*

3. 29 U.S.C. § 794.

4. 20 U.S.C. § 1401(18).

5. 20 U.S.C. § 1401(16).

6. 20 U.S.C. § 1401(18)(d).

permit the student to benefit from the instruction provided.⁷ The lower courts have been cautioned not to impose their views of preferable educational methods on school districts;⁸ however, they frequently are asked to determine what level of services is required to meet IDEA's minimum standards.

The Fourth Circuit Court of Appeals held that a school district was not required to provide a sign language interpreter to a student who was voluntarily placed in a private sectarian school by his parents.⁹ The court found that IDEA required school districts to make available special education and related services to private school students, but did not require that those services be provided on site at sectarian schools. Since the student had been offered special education services at a public school, the court held that the school district complied with federal and state laws. The court further held that providing a cued speech interpreter in the classes of a sectarian school would violate the establishment clause.

The Fifth Circuit Court of Appeals held that there is no requirement under IDEA that students with disabilities must be provided with a full school day.¹⁰ This case arose when the school district recommended a reduction in the school day for a student with severe disabilities whose education consisted of basic sensory stimulation. The school district contended that the student was unable to tolerate prolonged stimulation. In approving the reduced day the appeals court noted that to presume that every student's school day should be the same length was at odds with IDEA's requirement that an IEP is to be individually tailored to meet the student's unique needs.

The Tenth Circuit Court of Appeals held that the regulations promulgated pursuant to IDEA¹¹ specifically excluded children who are socially maladjusted from the definition of seriously emotionally disturbed.¹² The court found that the fact that a child was socially maladjusted was not by itself evidence that the child was seriously emotionally disturbed and that testimony supported the district court's conclusion that the student in this case suffered from a conduct disorder, but was not seriously emotionally disturbed. The district court in Connecticut held that a student's academic achievement must be impeded to be classified as emotionally disturbed and entitled to special education.¹³

7. Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

8. *Id.*

9. Goodall *ex rel.* Goodall v. Stafford County Sch. Bd., 930 F.2d 363 (4th Cir. 1991).

10. Christopher M. *ex rel.* Laveta McA. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285 (5th Cir. 1991).

11. 34 C.F.R. § 300 *et seq.*

12. A.E. *ex rel.* Evans v. Independent Sch. Dist. No. 25, Adair County, Okla., 936 F.2d 472 (10th Cir. 1991).

13. Doe *ex rel.* Doe v. Board of Educ. of Conn., 753 F. Supp. 65 (D. Conn. 1990).

Procedural Safeguards

IDEA contains an elaborate system of due process safeguards to ensure that students with disabilities are properly identified, evaluated, and placed according to the Act's mandates.¹⁴ The regulations promulgated under IDEA state that the parents or guardian of a child with disabilities must be provided with the opportunity to participate in the development of the IEP for their child.¹⁵ These regulations also require school districts to obtain parental consent prior to evaluating the child or making an initial placement.¹⁶ Once a student has been placed in special education, the school district must provide the parents with proper notice before initiating a change in placement.¹⁷

Under IDEA an IEP must contain statements of the student's current educational performance, annual goals and short-term objectives, the specific educational services to be provided, the extent to which the child can participate in general education, the date of initiation and duration of services, and evaluation criteria to determine if objectives are being met.¹⁸

If the parents disagree with any of the school district's recommendations regarding a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing.¹⁹ Any party not satisfied with the final outcome of administrative proceedings may appeal to the state or federal courts;²⁰ however, all administrative remedies must be exhausted prior to resort to the courts unless it is futile to do so. While an administrative or judicial action is pending, the school district may not change the child's placement without parental consent²¹ or a court order.²²

The courts have been empowered to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard.²³ However, judges have been cautioned not to substitute their views of proper educational methodology for that of competent school authorities.²⁴ No statute of limitations for filing a lawsuit is contained within IDEA. Therefore, courts must turn to applicable state statutes to determine whether a given lawsuit is timely.

14. 20 U.S.C. § 1415.

15. 34 C.F.R. § 300.345.

16. 34 C.F.R. § 300.504(b).

17. 20 U.S.C. § 1415(b)(1)(C).

18. 20 U.S.C. § 1401(19).

19. 20 U.S.C. § 1415(b)(2).

20. 20 U.S.C. § 1415(e)(2).

21. 20 U.S.C. § 1415(e)(3).

22. *Honig v. Doe*, 484 U.S. 305 (1988).

23. 20 U.S.C. § 1415(e)(2)(C).

24. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

Development of Individualized Education Programs

The First Circuit Court of Appeals held that federal and state standards required school districts to consider the findings of an independent evaluator in the development of a student's IEP but there was no requirement that there be a substantive discussion of those findings.²⁵ Since the record indicated that the school district partially incorporated the independent evaluator's recommendations into its proposed IEP, the court found no evidence to support the parents' claim that the school district determined the student's placement prior to formulating the IEP.

A federal district court in Alabama held that a student's IEP was not appropriate since the academic objectives and methods of evaluation outlined in it were not individualized.²⁶ The court found that the objectives and evaluation methods were not individualized since they did not address his unique needs and abilities. In contrast, the Nebraska district court held that the IEP for a hearing impaired student was not defective as it described his present levels of performance in objective terms that could be interpreted by all concerned, and adequately stated the objective criteria, evaluation procedures, and schedules for determining whether the instructional objectives were being met.²⁷

Change in Placement

The Fifth Circuit Court of Appeals ruled that a student's transfer from one school building to another did not constitute a change in placement where the student's program remained substantially the same.²⁸ The student's IEP was fully implemented following the transfer.

The federal district court in Massachusetts held that the stay-put provision, which states that a special education student is to remain in his then current educational placement "unless the State or local educational agency and the parents or guardian otherwise agree,"²⁹ does not require the approval of the school district to change the child's placement.³⁰ The state's Bureau of Special Education Appeals (BSEA) had ordered a private school placement and the school district had failed to comply. In issuing a preliminary injunction ordering the private school placement, the court held that the school district's contention that the stay-put provision required the student to remain in the public schools pending appeals was without merit because

25. *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991).

26. *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990). For a consolidated case that was heard earlier, see *Chris D. v. Montgomery*, 743 F. Supp. 1524 (M.D. Ala. 1990); *THE YEARBOOK OF EDUCATION LAW* 1991 at 102-103.

27. *French v. Omaha Pub. Schs.*, 766 F. Supp. 765 (D. Neb. 1991).

28. *Weil v. Board of Elementary & Secondary Educ.*, 931 F.2d 1069 (5th Cir. 1991).

29. 20 U.S.C. § 1415(e)(3).

30. *Grace B. v. Lexington Sch. Comm.*, 762 F. Supp. 416 (D. Mass. 1991).

the state, acting through the BSEA, and the student's mother supported the private school placement.

A New York federal district court held that the purpose of section 1415 of IDEA is to ensure that students with disabilities are not deprived of an education while awaiting the final outcome of administrative hearings and that the congressional goal was satisfied by a public school placement, regardless of whether it was in a special education or general education situation.³¹ The parents filed the court action seeking placement in a general education kindergarten whereas the school district recommended a special education placement.

An Illinois district court ruled that the stay-put provision did not apply to a student who was unilaterally placed by his parents.³² The court stated that section 1415 is meant to protect a student from interruptions in the educational program, but cannot be interpreted to mean that a student not yet placed by the state must remain in the current educational placement.

Administrative Hearings

A Pennsylvania district court held that the state's due process hearing system violated IDEA because the Secretary of Education, who heard appeals of local hearing decisions, was not impartial.³³ The court noted that the Secretary's involvement in the administrative proceedings was previously invalidated by the Third Circuit Court of Appeals³⁴ and that the state had since modified the process. The district court in Massachusetts also invalidated that state's administrative due process scheme.³⁵ In a 1988 decision that was just recently released for publication the court held that the state's two-step process, which provided for both the hearing and the appeal to be at the state level, violated IDEA as the Act's regulations provide that the state is to have only one opportunity to adjudicate a special education dispute. Since the second step in the process was invalidated, the original hearing officer's decision was reinstated.

The Supreme Court of Ohio held that the parents of a special education student had the right to request a due process hearing the day before the student's eligibility for services ended under state law.³⁶ Even though the student's entitlement to services had ended the court held that the hearing officer had the authority to order compensatory education services.

31. *Logsdon ex rel. Logsdon v. Board of Educ. of the Pavilion Cent. Sch. Dist.*, 765 F. Supp. 66 (W.D.N.Y. 1991).

32. *Joshua B. v. New Trier Township High Sch. Dist.* 203, 770 F. Supp. 431 (N.D. Ill. 1991).

33. *Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City Sch. Dist.*, 757 F. Supp. 606 (E.D. Pa. 1991).

34. *Muth v. Central Bucks Sch. Dist.*, 839 F.2d 113 (3d Cir. 1988); *THE YEARBOOK OF EDUCATION LAW* 1989 at 101.

35. *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988).

36. *Board of Educ. of Strongsville City Sch. Dist. v. Theado*, 566 N.E.2d 667 (Ohio 1991).

Several lawsuits have been dismissed because the parents have failed to exhaust administrative remedies prior to bringing court action. The Second Circuit Court of Appeals affirmed the lower court's ruling that parents who had requested an accelerated evidentiary hearing were required to exhaust administrative remedies, but indicated that if state agencies persistently failed to render expeditious decisions, the courts had the power to assume jurisdiction on the grounds that exhaustion would be futile or inadequate.³⁷ A district court in Michigan ruled that a parent was required to exhaust administrative remedies regarding the school district's failure to provide a due process hearing.³⁸ The court found that the final resolution of the parent's request for a due process hearing did not occur until after court action had been filed.

The federal district court in Maine noted that Congress created the administrative scheme so that knowledgeable professionals would review special education placement decisions and that courts should review cases only after a thorough examination of administrative proceedings conducted by those professionals.³⁹ The court held that permitting parents to bypass administrative proceedings would undermine IDEA's scheme. The New Mexico district court dismissed a class action lawsuit for failure to exhaust even though two of the plaintiffs had exhausted administrative remedies.⁴⁰ The court held that every member of the class must exhaust those remedies. A state court in Texas held that the parents of learning disabled students who challenged the application of the state's "no pass, no play rule"⁴¹ were required to exhaust administrative remedies under IDEA.⁴²

The Eleventh Circuit Court of Appeals held that the parents of a student with disabilities who sought a residential placement had exhausted all administrative remedies.⁴³ The district court had held that it lacked jurisdiction because the parents had failed to exhaust their administrative remedies on all issues except for the residential placement, but the appeals court found that the record indicated that the hearing officer had made several determinations regarding the appropriateness of the entire IEP.

37. *Frutiger v. Hamilton Cent. Sch. Dist.*, 928 F.2d 68 (2d Cir. 1991).

38. *Lawson v. Edwardsburg Pub. Schs.*, 751 F. Supp. 1257 (W.D. Mich. 1990).

39. *Carey ex rel. Carey v. Maine Sch. Admin. Dist. #17*, 754 F. Supp. 906 (D. Me. 1990).

40. *Jackson ex rel. Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp. 1243 (D.N.M. 1990).

41. TEX. EDUC. CODE ANN. § 21.290 (Vernon 1987).

42. *Texas Educ. Agency v. Stamos ex rel. Class of All Pub. Sch. Children*, 817 S.W.2d 378 (Tex. Ct. App. 1991).

43. *J.S.K. ex rel. J.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).

Court Proceedings

The Tenth Circuit Court of Appeals held that the burden of proof in special education disputes rests with the party attacking the student's IEP.⁴⁴ The court found that IDEA placed the primary responsibility for the student's education on school authorities and that the reliance placed on their expertise created a presumption in favor of their IEP. Also, the Fourth Circuit Court of Appeals, in affirming a district court decision, held that the burden of proof is properly allocated to the party challenging the administrative decision.⁴⁵ The Fifth Circuit Court of Appeals and the Massachusetts district court also held that the burden was on the party challenging an administrative decision.⁴⁶

The Eleventh Circuit Court of Appeals held that by ordering a school district to change the goals of an IEP the district court substituted its choice of educational methods for that of school officials and thus the court had overstepped its authority.⁴⁷ In a separate case that same court held that a district court was required to extend full faith and credit to a state court decision that an IEP was appropriate as written but not to an administrative rehearing decision.⁴⁸ In reversing a district court's decision the District of Columbia Court of Appeals held that the lower court gave insufficient weight to the hearing officer's findings.⁴⁹ A Massachusetts district court stated that the decision of a hearing officer must be accorded some deference; however, where it concerned an issue of law the decision was not entitled to great deference.⁵⁰

The District of Columbia Court of Appeals held that a district court erred when it ruled that a school district's challenge of an administrative hearing decision was moot because the school year had ended.⁵¹ The appeals court held that there could be a reasonable expectation that the school district would once again be aggrieved by a similar application of IDEA's requirements and the legal question was likely to recur. An Indiana district court held that a lawsuit was moot because the student had reached the maximum age for services under state and federal statutes and thus no longer had a claim.⁵² The New Hampshire federal district court also held that a lawsuit

44. *Johnson ex rel. Johnson v. Independent Sch. Dist. No. 4, Bixby, Tulsa County, Okla.*, 921 F.2d 1022 (10th Cir. 1990).

45. *Barnett ex rel. Barnett v. Fairfax County Sch. Bd.*, 721 F. Supp. 757 (E.D. Va. 1989) *aff'd*, 927 F.2d 146 (4th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1990 at 98, 106, & 118.

46. *Christopher M. ex rel. Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285 (5th Cir. 1991); *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988).

47. *Todd D. ex rel. Robert D. v. Andrews*, 933 F.2d 1576 (11th Cir. 1991).

48. *J.S.K. ex rel. J.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).

49. *Kerkham ex rel. Kerkham v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84 (D.C. Cir. 1991). For a previous decision see *Kerkham v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988); THE YEARBOOK OF EDUCATION LAW 1989 at 102, 109.

50. *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988).

51. *Jenkins v. Squillacote*, 935 F.2d 303 (D.C. Cir. 1991).

52. *Merrifield v. Lake Cent. Sch. Corp.*, 770 F. Supp. 468 (N.D. Ind. 1991).

was moot since the only claim before it was that an IEP for a previous school year was inappropriate.⁵³ No monetary claims were being made and, since the school year ended, there had been no significant change in the student's situation and the school district's position. Furthermore, the court found that there was no reasonable expectation that the controversy would recur.

The District of Columbia District Court held that a school district can be required to provide information concerning private schools, the qualifications of the teachers at those schools, and the disabling conditions of students attending those schools since that information was not privileged.⁵⁴ The school district was not required to provide information concerning due process hearings and lawsuits in which the school district's placement decisions had been challenged since that information could be discovered by plaintiffs' counsel through legal research.

The Eleventh Circuit Court of Appeals held that since a settlement agreement was a contract it could be voided as against public policy only if it directly contravened a state or federal statute or policy.⁵⁵ The lower court had refused to approve the settlement agreement concerning the placement for a student with disabilities, finding that its cost (\$160,000 per year) was against public policy. The appeals court, however, issued a *writ of mandamus* to enforce the settlement agreement. In a separate case that same court held that principles of *res judicata* precluded further consideration of a state's claims in a case involving the assessment of maintenance fees to the parents of students in residential placements.⁵⁶ The case previously had been remanded by the appeals court and the state appealed the district court's decision on remand.

Standing to Sue

An Indiana district court held that a school district had standing to sue the Assistant Secretary for the Federal Office of Special Education and Rehabilitative Services since it had stated a sufficient threatened injury and the injury was not so speculative as to defeat the district's standing.⁵⁷ The court also found that administrative review would not redress the school district's claims concerning a policy letter issued by the Assistant Secretary.

53. *Greene ex rel. Greene v. Harrisville Sch. Dist.*, 771 F. Supp. 1 (D.N.H. 1990).

54. *Fagan v. District of Columbia*, 136 F.R.D. 5 (D.D.C. 1991).

55. *In re Smith*, 926 F.2d 1027 (11th Cir. 1991).

56. *Jenkins ex rel. Jenkins v. Florida*, 931 F.2d 1469 (11th Cir. 1991). For a previous decision see *Jenkins v. Florida*, 815 F.2d 629 (11th Cir. 1987); *THE YEARBOOK OF EDUCATION LAW* 1988 at 177.

57. *Metropolitan Sch. Dist. of Wayne Township, Marion County, Ind. v. Davila*, 770 F. Supp. 1331 (S.D. Ind. 1991).

Statute of Limitations

Since IDEA does not contain a statute of limitations for filing lawsuits, courts are often called upon to determine the appropriate limitations period under analogous state law. The New Hampshire district court held that an action under IDEA more closely resembled an administrative appeal than a personal civil action.⁵⁸ The court also indicated that the thirty day administrative appeal period was consistent with the policies of IDEA that were designed to bring about speedy resolutions to placement disputes. A Michigan district court held that the appropriate statute of limitations was the three year statute applicable to claims against the state and that the sixty day statute applicable to appeals from agency decisions was not sufficient for parents to pursue judicial review.⁵⁹ A state court of appeals in Virginia held that a one year limitations period provided a proper balance between the concerns for a speedy resolution of a dispute and unduly hindering a party in preparing an appeal.⁶⁰

The Sixth Circuit Court of Appeals held that it did not matter whether the court adopted a one-year or five-year limitations period since either one would have passed when the lawsuit was filed.⁶¹ The court held that the limitations period began on the day the student turned twenty-one since that was when her eligibility for services ended. Even though the school district had continued to provide services beyond that date, they were not required to do so and this did not effect the limitations period. The Eleventh Circuit Court of Appeals held that a school board never effectively raised the statute of limitations as an affirmative defense and thus waived it as a defense.⁶²

Actions Under Other Statutes

The district court in Massachusetts held that it did not have jurisdiction to enforce a hearing officer's decision since the plaintiff was the prevailing party in the administrative action and since IDEA provided access to the courts only to the aggrieved party, but that it was empowered to issue a preliminary injunction under 42 U.S.C. section 1983.⁶³ An Illinois district court also held that parents could not bring an action under IDEA to enforce an administrative order, but action could be brought under section 1983 since that was the more appropriate vehicle to enforce rights secured by laws of the United States.⁶⁴ However, a Michigan district court held that section 1983

58. *Bow Sch. Dist. v. Quentin W.*, 750 F. Supp. 546 (D.N.H. 1990).

59. *Lawson v. Edwardsburg Pub. Schs.*, 751 F. Supp. 1257 (W.D. Mich. 1990).

60. *School Bd. of the County of York v. Nicely*, 408 S.E.2d 545 (Va. Ct. App. 1991).

61. *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991).

62. *J.S.K. ex rel. J.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).

63. *Grace B. v. Lexington Sch. Comm.*, 762 F. Supp. 416 (D. Mass. 1991).

64. *Reid v. Board of Educ., Lincolnshire-Prairie View Sch. Dist.*, 103, 765 F. Supp. 965 (N.D. Ill. 1991).

cannot be used to enforce rights protected by IDEA since the litigant would not have to utilize administrative remedies under IDEA.⁶⁵

Placement

Regulations for IDEA require school districts to insure that a "continuum of alternative placements" exists to meet the needs of students with disabilities for special education and related services.⁶⁶ That continuum must range from placement within the general education classroom to a private residential facility and also must include homebound instruction. However, the placement chosen for any given student with disabilities must be in the least restrictive environment (LRE) for that child and removal from the general education classroom is to occur only to the extent necessary to provide special education services.⁶⁷ The placement must be made at public expense and must meet state educational standards.⁶⁸ Every placement must be reviewed at least annually and revised if necessary.⁶⁹ The Supreme Court has held that an appropriate placement is one that is developed in compliance with IDEA's procedures and is reasonably calculated to enable the child to receive educational benefit.⁷⁰ Although states must adopt policies and procedures that are consistent with federal law, they may provide greater benefits than those required by IDEA. If a state does establish higher standards, courts will consider those standards when evaluating the appropriateness of the IEP.⁷¹

Appropriate Educational Placement

The First Circuit Court of Appeals held that once a school district determined that a particular placement was appropriate, it had no duty to consider more restrictive alternatives since it had already considered various options along the continuum from least restrictive to most restrictive.⁷² After reviewing prior case law the court also determined that New Hampshire did not have a higher standard of appropriateness than that under IDEA.

The District of Columbia Court of Appeals held that even though a student would have made less progress in the placement chosen by the school district, it was appropriate because it would confer some educational ben-

65. *Lawson v. Edwardsburg Pub. Schs.*, 751 F. Supp. 1257 (W.D. Mich. 1990).

66. 34 C.F.R. § 300.553.

67. 34 C.F.R. § 300.550.

68. 20 U.S.C. § 1401(18).

69. 34 C.F.R. § 300.552(a)(1).

70. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

71. See, e.g., *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411 (1st Cir. 1985); *Geis v. Board of Educ. of Parsippany-Troy Hills, Morris County*, 774 F.2d 575 (3d Cir. 1985); *THE YEARBOOK OF SCHOOL LAW* 1986 at 131.

72. *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991).

efit.⁷³ The Eleventh Circuit Court of Appeals stated that when determining whether a student has received educational benefits from an IEP the courts need determine only whether the child has received the basic floor of opportunity established by IDEA.⁷⁴ The court held that the educational outcome of the IEP need not maximize the child's learning but should result in measurable and adequate gains in the classroom. The court noted that adequacy must be determined on a case-by-case basis.

In finding that a proposed IEP was inappropriate, an Alabama district court held that a student did not receive an appropriate education simply because he learned something.⁷⁵ The court ruled that the educational benefit standard was not satisfied by a program which offered no hope of improvement, lacked a means for evaluating and revising instructional strategies, and did not teach the student to work independently. The court also found that the teachers in the program lacked the expertise needed to implement an IEP that would result in educational progress. Additionally, the court found that the behavioral control approach used was not adequate as it did not teach the student to control his own behavior.

The district court in Massachusetts, a state with a higher standard of appropriateness, held that since state standards are incorporated into IDEA, the school district's violation of state procedures rendered their actions inappropriate.⁷⁶ The court further held that the fact that the student earned a high school diploma did not mean that she did not require special education services; it merely indicated that she succeeded despite the school district's failure to follow proper procedures.

The Fourth Circuit Court of Appeals held that passing marks and annual grade promotions are important considerations under IDEA; however, a student's success in achieving those marks and an annual promotion was not automatically dispositive.⁷⁷ The court noted that many students with disabilities can never achieve at grade level and that school districts cannot be required to do the impossible. On the other hand, the court also noted that other students may earn passing marks and be promoted without special education services but that fact did not relieve the school district of its obligation under IDEA. After an extensive review of states that have higher standards of appropriateness, the court found that differences in the wording of Maryland's law from IDEA may indicate that the state intended to provide a level of services above the federal minimum. The case was remanded for a determination.

73. *Kerkham ex rel. Kerkham v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84 (D.C. Cir. 1991). For a previous decision see *Kerkham v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988); *THE YEARBOOK OF EDUCATION LAW* 1989 at 102, 109.

74. *J.S.K. ex rel. J.K. v. Hendry Cty. Sch. Bd.*, 941 F.2d 1563 (11th Cir. 1991).

75. *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990).

76. *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988).

77. *In re Conklin*, 946 F.2d 306 (4th Cir. 1991).

The District of Columbia District Court held that the determination of progress is a factor to consider in assessing any special education program and the fact that a child was progressing suggested that the program was providing an educational benefit.⁷⁸ Accordingly, since the plaintiff made little or no progress in a public school program the court found the program to be inappropriate. A Pennsylvania district court also found that where a student regressed when private speech therapy services were halted, there was sufficient evidence that the school district had not been providing him with an appropriate education.⁷⁹

The Seventh Circuit Court of Appeals held that it was permissible to consider parental hostility to an IEP as part of the prospective evaluation of the IEP's educational benefits.⁸⁰ The court found that IDEA did not limit the factors that can be considered when judging the effect of the IEP on the student as long as they relate to the question of expected educational benefits. In noting that the IEP is to be designed to serve the educational interests of the child, the court stated that a child cannot be enrolled in a program that has been doomed by the parents merely to allow the courts to discipline the parents.

The District Court in New Hampshire ruled that a student's right to a free appropriate public education cannot be premised on the condition that he be medicated without his parents' consent.⁸¹ A provision in the proposed IEP that called for one of his parents to come to the school to remove him from class when he was unruly also was struck down.

As discussed earlier, the Fifth Circuit Court of Appeals held that a lower court did not err, in approving a reduced school day, to balance a student's minimal ability to benefit from a full school day against the physical distress that would result from prolonged sensory stimulation.⁸² Additionally, the Eleventh Circuit Court of Appeals ruled that a student had to be placed in a facility close enough to his home to allow implementation of his transition goals in order to receive an appropriate education.⁸³

Least Restrictive Environment

Although IDEA's regulations state a preference for educating students with disabilities in their home or neighborhood school⁸⁴ centralized pro-

78. Angevine v. Jenkins, 752 F. Supp. 24 (D.D.C. 1990).

79. Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City Sch. Dist., 757 F. Supp. 606 (E.D. Pa. 1991).

80. Board of Educ. of Community Consol. Sch. Dist. No. 21, Cook County, Ill. v. Illinois State Bd. of Educ., 938 F.2d 712 (7th Cir. 1991).

81. Valerie J. v. Derry Coop. Sch. Dist., 771 F. Supp. 483 (D.N.H. 1991).

82. See *supra* note 10 and accompanying text; Christopher M. *ex rel.* Laveta McA. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285 (5th Cir. 1991).

83. Todd D. *ex rel.* Robert D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991).

84. 34 C.F.R. § 300.552(c).

grams have been approved by the courts. The Fourth Circuit Court of Appeals affirmed the lower court's ruling that a school district was not required to provide a cued speech interpreter in a hearing impaired student's home school.⁸⁵ The appeals court stated that whether a particular service could feasibly be provided in a particular setting was an administrative decision that the courts were not particularly well situated to make. The court held that the school district complied with IDEA's LRE requirements when it placed the student in a centralized program. The Eighth Circuit Court of Appeals held that a school district was not required to modify the neighborhood school so that a student who used a wheelchair could attend it.⁸⁶ Again, the court held that school officials were given discretion in selecting the location where a student with disabilities would be educated and that busing a student to another school still provided her with a fully integrated education.

An Alabama district court struck down a school district's placement of a student with academic and behavioral problems in a segregated special education classroom that offered him no realistic prospect of returning to the general education setting.⁸⁷ The court ordered the school district to make use of supplementary aids and services to enable the student to attend classes with nondisabled peers. A district court in Georgia held that a school district could adequately educate a nine year old mentally handicapped student in a general education kindergarten classroom with the use of supplementary aids and services.⁸⁸ The court noted that these additional services would allow the student to receive educational benefit from the kindergarten class. In a disturbing footnote the court stated that "[w]hat the court orders done this day may not be in the best interest of [the student]—that however is not the issue."⁸⁹

The Sixth Circuit Court of Appeals held that a special education class placement in the public schools, with some mainstreaming, was appropriate for a learning disabled student.⁹⁰ The court found that the student would have more of an opportunity to interact with nondisabled students in the public school than in the private school where he had been unilaterally placed by his parents. Ironically, his parents had stated a preference for a regular class placement with some tutoring. The court found that the student could not be fully mainstreamed without detriment to his own education and that of his classmates.

85. *Barnett ex rel. Barnett v. Fairfax County Sch. Bd.*, 721 F. Supp. 757 (E.D. Va. 1989), *aff'd* 927 F.2d 146 (4th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1990 at 98, 106, 118.

86. *Schuldt v. Mankato Indep. Sch. Dist.* No. 77, 937 F.2d 1357 (8th Cir. 1991).

87. *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990).

88. *Greer ex rel. Greer v. Rome City Sch. Dist.*, 762 F. Supp. 936 (N.D. Ga. 1990).

89. *Id.* at 947 n.10.

90. *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd* 932 F.2d 551 (6th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1990 at 107, 111.

The federal district court in Nebraska held that placement in a public school class for the hearing impaired was not appropriate for a student with a profound hearing loss since any marginal benefits he would receive from mainstreaming would not outweigh the benefits he would gain from instruction in a state school for deaf students.⁹¹ None of the public school classes was deemed appropriate by the court since they would not meet his needs for interaction with peers of his chronological age or language development level. A Pennsylvania district court also held that a student with a profound hearing loss could not be mainstreamed because of his oral communication deficiencies.⁹²

A Wisconsin district court held that the placement of a sixteen year old student with Down's Syndrome in a special education class located within the neighborhood school was preferable to a placement in a totally segregated facility.⁹³ The student's past success in an integrated environment persuaded the court that she would experience future success in an integrated setting. The District of Columbia Court of Appeals held that a severely retarded student's many self-care and functional skills would allow him to be educated in a setting that was less restrictive than the residential facility in which he had been enrolled.⁹⁴

Private Facilities

The District of Columbia Court of Appeals reversed a district court decision that a residential placement was appropriate for a severely retarded student.⁹⁵ In overturning the lower court's holding, the appeals court found that the student was not so disabled as to require around-the-clock care to benefit from a special education program. Finding that the child had many self-care and functional skills, the court held that he could be educated in a less restrictive setting than a residential facility. The Supreme Court of Nebraska also held that a residential placement was not required for a student with multiple disabilities who required a full year academic program.⁹⁶ However, a proposed public school program also was not deemed to be appropriate since it operated only during the normal school year. The court held that a private day program that offered twelve month programming would confer educational benefit.

The federal district court in Oregon held that a residential placement was required for an autistic student to receive a free appropriate public educa-

91. *French v. Omaha Pub. Schs.*, 766 F. Supp. 765 (D. Neb. 1991).

92. *Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City Sch. Dist.*, 757 F. Supp. 606 (E.D. Pa. 1991).

94. *Kerkham ex rel. Kerkham v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84 (D.C. Cir. 1991). For a previous decision see *Kerkham v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988); *THE YEARBOOK OF EDUCATION LAW* 1989 at 102, 109.

95. *Id.*

96. *Williams ex rel. Williams v. Gering Pub. Schs.*, 463 N.W.2d 799 (Neb. 1990).

tion.⁹⁷ The court found that the student required a twenty-four hour, seven day a week, consistent learning environment. In its ruling the court noted that an appropriate education for such a student was one that would make it possible for him to be successful outside a classroom setting. The court held that daily living skills, such as toileting, eating, and dressing, could be taught and reinforced only within the consistency of a residential setting.

Extended School Year (ESY)

The Tenth Circuit Court of Appeals reversed and remanded a district court ruling that a student with multiple disabilities did not require a structured summer educational program as part of her IEP.⁹⁸ The appeals court found that the lower court had relied solely on the regression/recoupment standard⁹⁹ in determining that the student did not require an ESY. On remand the lower court was instructed to consider other factors such as the degree of impairment, rate of progress, availability of other resources, and the student's skill level. Additionally, the lower court was instructed to consider whether the requested service was extraordinary or an integral part of a program for other students with the same condition. A Pennsylvania district court ordered the school district to consider the opinions of outside experts when determining a hearing impaired student's need for an ESY.¹⁰⁰

The Supreme Court of Nebraska upheld a trial court's order for the school district to develop an IEP that provided a twelve month program for a student with multiple disabilities.¹⁰¹ The court also held that the program was to be at a private day school since the school district operated only a nine month program and that even if the school district made other arrangements for summer programming, the adjustment period between programs would render the result inappropriate.

Related Services

School districts are required under IDEA to provide related or supportive services to students with disabilities if such services are needed to assist the students in benefitting from their special education.¹⁰² The Act specifically refers to developmental, supportive, or corrective services such as

97. *Ash v. Lake Oswego Sch. Dist.* No. 71, 766 F. Supp. 852 (D. Or. 1991).

98. *Johnson ex rel. Johnson v. Independent Sch. Dist. No. 4, Bixby, Tulsa County, Okla.*, 921 F.2d 1022 (10th Cir. 1990).

99. See *Armstrong v. Kline*, 476 F. Supp. 583 (E.D. Pa. 1979), *aff'd sub. nom. Battle v. Commonwealth of Pa.*, 629 F.2d 269 (3d Cir. 1980), *on remand* 513 F. Supp. 425 (E.D. Pa. 1981), *cert. denied sub nom. Scanlon v. Battle*, 449 U.S. 1109 (1982).

100. *Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City Sch. Dist.*, 757 F. Supp. 606 (E.D. Pa. 1991).

101. *Williams ex rel. Williams v. Gering Pub. Schs.*, 463 N.W.2d 799 (Neb. 1990).

102. 20 U.S.C. § 1401(a)(17).

transportation, speech pathology, audiology, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation and social work services), counseling services (including rehabilitation counseling), medical services (for diagnostic or evaluative purposes only), and early identification and assessment as related services.¹⁰³ The only limitation placed on what could be a related service is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes. The Supreme Court has held that related services need be provided only to students receiving special education and only those services that are necessary for the child to benefit from special education must be incorporated into the IEP.¹⁰⁴

A federal district court in Alabama ordered the school district to provide counseling and training to the parents of a student who had exhibited academic and behavioral problems since entering school.¹⁰⁵ The court held that the school district ignored a crucial component of an appropriate behavioral control program by failing to counsel and instruct the parents in how to reinforce at home the training the student received in school.

The district court in New Jersey held that a substance abuse program was not a related service.¹⁰⁶ The court found that the substance abuse program consisted of psychiatric counseling, physical evaluations and administration of medication and thus, was medical. The court also found that the treatment provided clearly was segregable from the learning process even though it benefited learning. The court held that the student's parents were responsible for providing the substance abuse program.

Discipline

There are no provisions that specifically refer to discipline within IDEA; however, disciplinary sanctions as applied to students with disabilities are sometimes the source of litigation. In past cases the courts have held that IDEA's change in placement and status quo provisions were applicable to the disciplinary process. The Supreme Court has held that special education students cannot be expelled for disciplinary reasons where the misconduct is a manifestation of the disability.¹⁰⁷ However, the Court's decision has not left school districts without recourse. Special education students may be temporarily suspended, and are subject to other normal disciplinary sanctions. If necessary a school district may seek court intervention pending completion of administrative due process hearings in situations where it is felt that a student is dangerous and school officials cannot reach an agreement

103. *Id.* as amended by 104 Stat. 1103 § 101(c) (1990).

104. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

105. *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922 (M.D. Ala. 1990).

106. *Field v. Haddonfield Bd. of Educ.*, 769 F. Supp. 1313 (D.N.J. 1991).

107. *Honig v. Doe*, 484 U.S. 305 (1988).

with the student's parents concerning a proper placement. The Supreme Court's decision has significantly lessened the litigation over disciplinary issues as very few cases have been reported since its opinion was issued.

A district court in Texas issued a temporary injunction prohibiting an emotionally disturbed student from attending general education classes.¹⁰⁸ The student had assaulted teachers and other students, destroyed school property, used profanity, and threatened to kill himself and others. The school district recommended a placement in a self-contained behavioral management class; however, the student's parents rejected that option. The court found that the student constituted a severe and on-going threat of imminent danger to himself and others. The court held that he could either attend the behavioral management class or receive home instruction pending the completion of the administrative review process.

Remedies

If a school district fails to provide an appropriate placement for a student with disabilities the courts are empowered to grant such relief as they determine to be appropriate.¹⁰⁹ Frequently the relief granted involves reimbursement of costs borne by the parents in unilaterally obtaining appropriate services for the child. The Supreme Court has ruled that school districts may be required to reimburse parents for costs incurred in providing their child with special education and related services if they prevail in having their chosen placement deemed appropriate.¹¹⁰ Awards of compensatory education services have been made in situations where the parents did not have the financial means to obtain private services while the litigation was pending.

In 1986 Congress passed the Handicapped Children's Protection Act to allow parents who prevail in a lawsuit pursuant to IDEA to recover their legal expenses.¹¹¹ In the 1990 Amendments to IDEA Congress also specifically abrogated the states' Eleventh Amendment immunity to lawsuits in the federal courts.¹¹² This provision was passed in response to the Supreme Court's ruling that Congress had not abrogated the states' sovereign immunity when it originally enacted the federal special education law.¹¹³

108. *Texas City Indep. Sch. Dist. v. Jorstad*, 752 F. Supp. 231 (S.D. Tex. 1990).

109. 20 U.S.C. § 1415(e)(2)(1).

110. *Burlington Sch. Comm. v. Department of Educ., Commonwealth of Mass.*, 471 U.S. 359 (1985).

111. Codified at 20 U.S.C. § 1415(e)(4)(B) *et seq.*

112. 104 Stat. 1103 § 103 (1990).

113. *Dellmuth v. Muth*, 491 U.S. 223 (1989).

Damages

The Sixth Circuit Court of Appeals held that IDEA does not create any right to recover damages for loss of earning power attributed to the failure of the school district to provide an appropriate education.¹¹⁴ The court characterized an award for lost wages as an award of damages which it held was not authorized by the Act. The district court for New Hampshire held that appropriate relief includes prospective relief but a damage remedy was not consistent with the Act.¹¹⁵ The Fourth Circuit Court of Appeals affirmed a lower court decision that denied damages for mental and emotional distress.¹¹⁶ The appeals court found no violation of IDEA and thus did not address the damages issue.

Tuition Reimbursement

The District of Columbia District Court awarded tuition reimbursement to the parents of a student with disabilities after finding that the school district had failed to evaluate the student within mandated time limits.¹¹⁷ The school district also had failed to comply with three separate orders of a hearing officer to place the student in an appropriate program. In another District of Columbia case the court held that the parents of an emotionally disturbed student who made a unilateral placement would be entitled to reimbursement if they could establish that the school district's proposed IEP was inappropriate.¹¹⁸

The district court in Massachusetts held that the parents' chosen placement does not have to be the exact proper placement but must be more appropriate than the school district's proposed placement for reimbursement to be warranted.¹¹⁹ The district court in Oregon ordered the school district to reimburse parents for a residential placement after finding that the school district had failed to offer an appropriate placement, but held that reimbursement was not required for any expenses incurred prior to the time the parents had requested preparation of an IEP.¹²⁰ A state court in New York held that the Commissioner of Education had the authority to award tuition reimbursement to parents who unilaterally enrolled their child in a neighboring school district.¹²¹ The Commissioner determined that the program in the neighboring district was appropriate.

114. *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991).

115. *Valerie J. v. Derry Coop. Sch. Dist.*, 771 F. Supp. 492 (D.N.H. 1991), supplementing 771 F. Supp. 483 (D.N.H. 1991); see *supra* notes 81, 128 and accompanying text.

116. *Barnett ex rel. Barnett v. Fairfax County Sch. Bd.*, 721 F. Supp. 755 (E.D. Va. 1989), *aff'd* 927 F.2d 146 (4th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1990 at 103, 111, 118.

117. *Shirk v. District of Columbia*, 756 F. Supp. 31 (D.D.C. 1991).

118. *Fagan v. District of Columbia*, 136 F.R.D. 9 (D.D.C. 1991).

119. *Norton Sch. Comm. v. Massachusetts Dep't of Educ.*, 768 F. Supp. 900 (D. Mass. 1991).

120. *Ash v. Lake Oswego Sch. Dist. No. 7J*, 766 F. Supp. 852 (D. Or. 1991).

121. *Northeast Cent. Sch. Dist. v. Sobol*, 572 N.Y.S.2d 752 (App. Div. 1991).

The Eleventh Circuit Court of Appeals affirmed a stipulation agreement approved by the district court that awarded reimbursement of maintenance fees that the state charged parents for residential placements.¹²² The maintenance fees had previously been held to be improper. The Eighth Circuit Court of Appeals affirmed a lower court decision that awarded reimbursement for privately obtained occupational therapy services.¹²³ The court found that the school district had been dilatory in addressing the parents' concerns about its occupational therapy program. A district court in Pennsylvania awarded reimbursement for private speech therapy services after determining that the school district had not provided a sufficient amount of services.¹²⁴

The Sixth Circuit Court of Appeals reversed a district court's reimbursement award after it also reversed the lower court's finding that the school district's proposed IEP was not appropriate.¹²⁵ A Pennsylvania district court denied tuition reimbursement after ruling that the private residential school the student had been attending was inappropriate.¹²⁶

Compensatory Services

Two district courts awarded compensatory services after finding that school districts committed procedural violations that resulted in the denial of a free appropriate public education. The district court in Massachusetts ordered the school district to provide remedial services to a student who had already graduated and was attending a junior college to compensate her for services it should have provided prior to her graduation.¹²⁷ The court held that the fact that the student had graduated did not mean that she had not required special education services. The New Hampshire District Court awarded seven and one-half months of compensatory services to be delivered after the student graduated or turned age twenty-one, whichever came later, to compensate him for a period of time in which the school district did not follow proper procedures.¹²⁸ During this period of time the school district failed to convene any meetings to review the student's program even though his difficulties in school had worsened.

122. *Jenkins ex rel. Jenkins v. Florida*, 931 F.2d 1469 (11th Cir. 1991). For a previous decision see 815 F.2d 629 (11th Cir. 1987); THE YEARBOOK OF EDUCATION LAW 1988 at 117.

123. *Rapid City Sch. Dist. 51/4 v. Vahle*, 733 F. Supp. 1364 (D.S.D. 1990), *aff'd* 922 F.2d 476 (8th Cir. 1990); THE YEARBOOK OF EDUCATION LAW 1991 at 108, 110.

124. *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, Lancaster City Sch. Dist., 757 F. Supp. 606 (E.D. Pa. 1991).

125. *Gillette ex rel. Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd* 932 F.2d 551 (6th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1990 at 107, 111.

126. *David H. ex rel. Susan H. v. Palmyra Area Sch. Dist.*, 769 F. Supp. 159 (M.D. Pa. 1990), *aff'd without pub. opinion* 932 F.2d 959 (3d Cir. 1991).

127. *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988); see *supra* note 76 and accompanying text.

128. *Valerie J. v. Derry Coop. Sch. Dist.*, 771 F. Supp. 483 (D.N.H. 1991).

The Eleventh Circuit Court of Appeals held that since a student was approaching age twenty-two and would no longer be eligible for special education, an award of compensatory educational services was appropriate to compensate him for the failure to provide him with an appropriate education.¹²⁹ The case was remanded to the district court to determine the length of time for which compensatory services were due. The court had found that the student's placement in an out-of-state facility was not appropriate as it could not effectively address goals in his IEP designed to help him make a transition back to his home community when he reached age twenty-two.

Attorney Fees

Two district courts held that prevailing parents were entitled to recover legal expenses incurred at the administrative hearing level.¹³⁰ One of those courts also held that the parents were entitled to recover their costs in obtaining a preliminary injunction to enforce the hearing officer's order.¹³¹ The Eighth Circuit Court of Appeals affirmed a lower court's attorney fees award to parents who prevailed in obtaining reimbursement for privately obtained occupational therapy services.¹³²

In several cases courts have awarded reimbursement of attorney fees, but have reduced the amount of the requested award since the parents did not prevail on all issues. The district court in New Jersey granted a partial fees award for work completed on a settlement agreement.¹³³ The court granted 50% of the parents' total legal costs because they did not achieve their primary objective but did succeed on several significant issues. The Fourth Circuit Court of Appeals affirmed a district court's reduction in a requested award due to insufficient record-keeping and the limited success achieved by the parents.¹³⁴ The Massachusetts District Court also reduced a requested award because the student had succeeded on only some of her claims.¹³⁵

A state appellate court in Illinois held that the responsibility for paying an attorney fees award should be apportioned among the school district and state agencies that were involved in the litigation.¹³⁶ The parents had obtained relief from all parties but the trial court refused to apportion any part

129. Todd D. *ex rel.* Robert D. v. Andrews, 933 F.2d 1576 (11th Cir. 1991); *see supra* note 83 and accompanying text.

130. Grace B. v. Lexington Sch. Comm., 762 F. Supp. 416 (D. Mass. 1991); Reid v. Board of Educ., Lincolnshire-Prairie View Sch. Dist. 103, 765 F. Supp. 965 (N.D. Ill. 1991).

131. Grace B. v. Lexington Sch. Comm., 762 F. Supp. 416 (D. Mass. 1991).

132. Rapid City Sch. Dist. 51/4 v. Vahle, 733 F. Supp. 1364 (D.S.D. 1990), *aff'd* 922 F.2d 476 (8th Cir. 1990); THE YEARBOOK OF EDUCATION LAW 1991 at 108, 110.

133. Field v. Haddonfield Bd. of Educ., 769 F. Supp. 1313 (D.N.J. 1991).

134. *In re* Conklin, 946 F.2d 306 (4th Cir. 1991).

135. Puffer v. Reynolds, 761 F. Supp. 838 (D. Mass. 1988).

136. Community Consolidated Sch. Dist. No. 54 v. Illinois State Bd. of Educ., 576 N.E.2d 250 (Ill. App. Ct. 1991).

of the fees to the state agencies on the grounds that the school district had unreasonably prolonged the proceedings.

State Immunity

In a decision handed down prior to the enactment date of the 1990 amendment to IDEA abrogating the states' sovereign immunity,¹³⁷ a Pennsylvania district court stated that the Eleventh Amendment barred an award of tuition reimbursement against the state.¹³⁸ An Illinois district court held that the 1990 amendment was controlling over earlier Supreme Court decisions for violations that occurred in whole or in part after the amendment's enactment date.¹³⁹ Since certain violations alleged in the lawsuit were ongoing the court held that they would defeat Eleventh Amendment immunity.

Other IDEA Issues

A federal district court in Indiana held that a letter issued by the Assistant Secretary for the Office of Special Education and Rehabilitative Services was subject to the Administrative Procedures Act's (APA)¹⁴⁰ public notice requirements.¹⁴¹ The letter expressed the view that IDEA's mandates concerning the provision of an appropriate education applied to students during long term suspensions or expulsions resulting from misconduct that was not a manifestation of their disability. The letter had not been officially published in the Federal Register but had been made available through a looseleaf law reporting service. The court held that the letter was a substantive rule or regulation that imposed a new and mandatory duty upon all school districts. The court found that the new duty was not expressly required by either the IDEA or the Supreme Court's *Honig v. Doe*¹⁴² decision. The court further found that the letter clearly was intended to be binding on school districts and therefore purported to create law implementary to an existing law, and thus qualified as a substantive rule subject to the APA.

The Supreme Judicial Court of Massachusetts held that an individual special education student whose program was funded by the state was not

137. 104 Stat. 1103 § 103(c) states that the provisions of this section were to take effect "with respect to violations that occur in whole or part after the date of the enactment" of this amendment. The amendment was enacted on October 30, 1990.

138. David H. *ex rel.* Susan H. v. Palmyra Area Sch. Dist., 769 F. Supp. 159 (M.D. Pa. 1990), *aff'd without pub. opinion* 932 F.2d 959 (3d Cir. 1991); see *supra* note 126 and accompanying text.

139. Joshua B. v. New Trier Township High Sch. Dist. 203, 770 F. Supp. 431 (N.D. Ill. 1991); see *supra* note 137.

140. 5 U.S.C. § 553.

141. Metropolitan Sch. Dist. of Wayne Township, Marion County, Ind. v. Davila, 770 F. Supp. 1331 (S.D. Ind. 1991).

142. 484 U.S. 305 (1988).

entitled to have the facility's tuition set at a particular figure.¹⁴³ The court stated that if the facility could not provide the educational program called for in the student's IEP, the student could challenge his placement at that facility through IDEA's due process mechanism.

State Laws

Special education is governed by state law as well as federal law. Each state's special education statutes must be consistent with IDEA; however, differences do exist. Most states have legislation similar in scope to IDEA; but, several states have requirements that go beyond IDEA's provisions. Some states have higher standards of what constitutes an appropriate education and/or stricter procedural requirements. In other instances state laws establish procedures for special education program implementation that are not explicitly covered by federal law. Federal and state courts frequently are called upon to interpret these provisions.

The state courts in New York decided a number of issues specific to that state in 1991. The court of appeals held that the residence of a child for purposes of the education statutes is presumed to be the residence of the parents unless there is proof that the parents have surrendered parental control to some other person with whom the child lives.¹⁴⁴ This decision reversed lower court rulings that a child who resides in a family home at board was a resident of the school district in which the home was located. An appellate court held that the Commissioner of Education's determinations regarding the tuition rates for pre-school special education students were arbitrary and capricious.¹⁴⁵ The court found that rates set by previous contracts had been superseded by the enactment of new legislation. An appellate court also held that the Commissioner had the authority under state law to order reimbursement of the costs of educating a special education student in a neighboring school district.¹⁴⁶ A trial court's decision that parents seeking a residential placement were required to exhaust administrative remedies was affirmed on appeal.¹⁴⁷ The parents had not shown that pursuing administrative remedies would be futile or would cause irreparable injury, according to the court. A trial court's decision that a lawsuit was time-barred since it was commenced more than one year after the statute of limitations had passed also was upheld on appeal.¹⁴⁸

143. Behavior Research Inst. v. Secretary of Admin., 577 N.E.2d 297 (Mass. 1991).

144. Catlin *ex rel.* Catlin v. Sobol, 553 N.Y.S.2d 501 (App. Div. 1990), *rev'd* 569 N.Y.S.2d 353 (N.Y. 1991); THE YEARBOOK OF EDUCATION LAW 1991 at 112.

145. Long Island Ass'n for Children with Learning Disabilities v. Sobol, 572 N.Y.S.2d 787 (App. Div. 1991).

146. Northeast Cent. Sch. Dist. v. Sobol, 572 N.Y.S.2d 752 (App. Div. 1991).

147. Dawson v. Gibson, 575 N.Y.S.2d 517 (App. Div. 1991).

148. Board of Educ. of Katonah-Lewisboro Sch. Dist. v. Board of Educ. of Carmel Cent. Sch. Dist., 549 N.Y.S.2d 322 (Sup. Ct. 1989), *aff'd* 571 N.Y.S.2d 333 (App. Div. 1991); THE YEARBOOK OF EDUCATION LAW 1991 at 112.

Federal district courts in two states held that the administrative due process scheme established by state law violated IDEA.¹⁴⁹ Pennsylvania's former practice of having the Secretary of Education act as a reviewing officer for administrative appeals was held not to be impartial. However, after administrative proceedings had ended but before the court hearing on this action had been completed the state had modified its due process scheme to eliminate the Secretary's involvement. The Massachusetts scheme provided for both the initial hearing and the appeal to be at the state level. The court held that IDEA's regulations provided that the state was to have only one opportunity to adjudicate a special education dispute. In the same action the court ruled that the school district's failure to produce either a formal IEP or a statement that the student had no special needs violated the student's rights under state statute. The Supreme Judicial Court of Massachusetts held that the state's special education statute, which entitles students to an education that assures their maximum possible development, does not entitle them to payment of a particular tuition rate to a particular provider.¹⁵⁰

The Fifth Circuit Court of Appeals held that there was no requirement under either IDEA or state law that students with disabilities must be provided with a full school day.¹⁵¹ Two federal appeals courts rendered decisions concerning whether state laws established higher standards of appropriateness than IDEA.¹⁵² The Fourth Circuit Court of Appeals remanded a lawsuit to the district court for a determination as to whether Maryland's special education statute established a higher standard of appropriateness than IDEA. The court found that differences in the wording between the federal and state laws may indicate that the state intended to provide a level of services above the federal minimum. The First Circuit Court of Appeals, after reviewing prior case law, determined that New Hampshire did not have a higher standard of appropriateness.

Discrimination under the Rehabilitation Act, Section 504

Section 504 of the Rehabilitation Act of 1973, as amended, provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of his or her handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or

149. *Johnson v. Lancaster-Lebanon Intermediate Unit 13*, Lancaster City Sch. Dist., 757 F. Supp. 606 (E.D. Pa. 1991); *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988).

150. *Behavior Research Inst. v. Secretary of Admin.*, 577 N.E.2d 297 (Mass. 1991).

151. *Christopher M. ex rel. Laveta McA. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285 (5th Cir. 1991).

152. *In re Conklin*, 946 F.2d 306 (4th Cir. 1991); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942 (1st Cir. 1991).

activity receiving [f]ederal financial assistance"¹⁵³ Section 504 effectively prohibits any recipient of federal funds from discriminating against individuals with disabilities in the provision of services or employment. Section 504 applies to any agency that receives federal funds, not just the schools. For that reason this section includes several selected cases that did not arise in an educational context, but which contain legal principles that are applicable to educational programs.

A person is considered to have handicaps under section 504 if the person has a physical or mental impairment that substantially limits one or more of the person's major life activities, has a record of such an impairment, or is regarded as having an impairment.¹⁵⁴ Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁵⁵ The Supreme Court has held that a person is otherwise qualified for purposes of section 504 if the person is capable of meeting all of a program's requirements in spite of his handicap.¹⁵⁶ If a person is otherwise qualified a recipient of federal funds is expected to make reasonable accommodations for the person's disabilities unless doing so would create an undue hardship.¹⁵⁷

Students

Elementary and Secondary. Students with disabilities at the elementary and secondary level have rights under section 504 as well as IDEA. For that reason many lawsuits state claims under both statutes. Often the claims stated under one statute are identical or similar to claims stated under the other; however, sometimes distinct claims are raised under section 504.

The Fourth Circuit Court of Appeals held that requiring a school board to provide every hearing impaired student with an interpreter at the home school instead of in a centralized location would amount to a substantial modification and was not required by section 504.¹⁵⁸ The district court in Massachusetts found that a student with learning impairments was handicapped under section 504, but that her rights under the Act were not violated since the school district had offered special education services.¹⁵⁹ The court held that no violation occurred even though the special education services were not offered in a procedurally correct manner.

153. 29 U.S.C. § 794.

154. 29 U.S.C. § 706(7)(B).

155. 28 C.F.R. § 41.31.

156. *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

157. 34 C.F.R. § 104.12.

158. *Barnett ex rel. Barnett v. Fairfax County Sch. Bd.*, 721 F. Supp. 757 (E.D. Va. 1989), *aff'd* 927 F.2d 146 (4th Cir. 1991); *THE YEARBOOK OF EDUCATION LAW* 1990 at 98, 106, 118.

159. *Puffer v. Reynolds*, 761 F. Supp. 838 (D. Mass. 1988).

The district court in Maine held that plaintiffs may not use section 504 to expand the scope of remedies which are available under IDEA.¹⁶⁰ According to the court, section 504 may be used only to pursue remedies available under IDEA. The court held that IDEA's exhaustion of administrative remedies requirement applied to claims under section 504 that sought to enforce rights guaranteed by IDEA.

A district court in Pennsylvania found that a student's section 504 claims were not viable since the student was not discriminated against because of his handicap.¹⁶¹ A federal district court in Michigan held that section 504 provided aggrieved persons with the right to seek modifications of discriminatory programs, but did not permit an award of damages.¹⁶² However, the court found that since the student had died, program modification claims would be moot.

Higher Education. The Third Circuit Court of Appeals held that there was sufficient evidence to create a material issue of fact concerning whether a medical college knew or had reason to know that a student was an individual with handicaps.¹⁶³ The student had been forced to withdraw from her studies because she could not obtain seating at the school that was appropriate to her physical needs. The district court had dismissed the student's complaint that the school had failed to accommodate her, finding that the school had no reason to consider the student's condition to be a handicap. The appeals court reversed after finding that several issues of material fact existed concerning whether the school's failure to accommodate the student amounted to benign neglect which effectively made its program unavailable.

The First Circuit Court of Appeals reversed and remanded a district court's ruling that a medical student with dyslexia who had failed several courses was not an otherwise qualified handicapped person.¹⁶⁴ The appeals court stated that the record was not clear that the student would be unable to meet the university's standards even if alternatives to written multiple choice exams were available or if any evaluation of possible ways to accommodate the student had been made.

A New York district court held that a funding cap that had been placed on tuition and maintenance fees associated with a student's law school education did not violate the student's rights under section 504 since it was applied to all individuals equally without regard to the severity of their handicap.¹⁶⁵ However, the court did find that section 504 was violated by the state's practice of providing a higher level of benefits to individuals with visual disabilities.

160. *Carey ex rel. Carey v. Maine Sch. Admin.* Dist. #17, 754 F. Supp. 906 (D. Me. 1990).

161. *David H. ex rel. Susan H. v. Palmyra Area Sch. Dist.*, 769 F. Supp. 159 (M.D. Pa. 1990), *aff'd without pub. opinion* 932 F.2d 959 (3d Cir. 1991).

162. *Waechter v. School Dist. No. 14-030, Cassopolis, Mich.*, 773 F. Supp. 1005 (W.D. Mich. 1991).

163. *Nathanson v. Medical College of Pa.*, 926 F.2d 1368 (3d Cir. 1991).

164. *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19 (1st Cir. 1991).

165. *McGuire v. Switzer*, 734 F. Supp. 99 (S.D.N.Y. 1990).

Employees

Discrimination Claims. The Eleventh Circuit Court of Appeals held that the dismissal of an employee who had refused to perform assigned duties, after accommodations had been made due to his health status, was for legitimate reasons and was not based on unlawful discrimination.¹⁶⁶ A district court in New York also held that there was insufficient evidence to indicate that an employee with health problems was terminated or discriminated against solely by reason of his claimed handicaps.¹⁶⁷ The employee had been discharged after he was found guilty of abusing sick and personal leave, excessive absenteeism, falsely reporting leave use, and inaccurately reporting leave use. An Ohio district court also dismissed the discrimination claims of a teacher who had multiple sclerosis after finding that there was insufficient evidence that she had been terminated from her position.¹⁶⁸

The Eighth Circuit Court of Appeals held that genuine issues of material fact existed as to whether the responsibilities of a dismissed employee's former position continued to exist.¹⁶⁹ The employee had been discharged after a budget reduction. The district court had granted summary judgment for the employer but the appeals court reversed, stating that the issues of material fact precluded summary judgment.

A federal district court in Illinois dismissed the discrimination claims of an employee of the Department of Education whose request for maternity leave for purposes of adopting a child was not granted.¹⁷⁰ The court found that although the employee was able to show a nexus between her physical handicaps and her inability to bear children, she was not able to show that she was treated any differently than nonhandicapped adoptive parents.

Otherwise Qualified Individuals with Handicaps. The Fourth Circuit Court of Appeals held that a determination of whether an applicant for a teaching certificate was otherwise qualified in spite of her learning disability involved two factual determinations: (1) whether she could perform the essential functions of a teacher, and (2) whether the National Teachers Examination actually measured those functions.¹⁷¹ The applicant had failed the communications portion of the examination and filed suit claiming that the examination discriminated against her. The district court in Arizona held that section 504 requires that an individual determination be made as to whether a person with handicaps is otherwise qualified.¹⁷²

The federal district court in Maryland held that an employee was an otherwise qualified individual with handicaps since past job evaluations

166. *Severino v. North Fort Myers Fire Control Dist.*, 935 F.2d 1179 (11th Cir. 1991).

167. *Linares v. City of White Plains*, 773 F. Supp. 559 (S.D.N.Y. 1991).

168. *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 754 F. Supp. 570 (S.D. Ohio 1990).

169. *Johnson v. Minnesota Historical Society*, 931 F.2d 1239 (8th Cir. 1991).

170. *McWright v. Alexander*, 771 F. Supp. 256 (N.D. Ill. 1991).

171. *Pandazides v. Virginia Bd. of Educ.*, 946 F.2d 345 (4th Cir. 1991).

172. *Casey v. Lewis*, 773 F. Supp. 1365 (D. Ariz. 1991).

indicated that her performance was fully satisfactory.¹⁷³ An Ohio district court held that a teacher who had multiple sclerosis was otherwise qualified since she had worked for several years as a teacher and her claim that she was otherwise qualified was not in dispute.¹⁷⁴

A Virginia district court held that a former employee of the Navy who had Chronic Fatigue Immune Dysfunction Syndrome was handicapped, but was not otherwise qualified.¹⁷⁵ Due to her illness the employee was not able to work full time on a reasonable, regular, and predictable schedule and the court found regular attendance to be an essential function of her position. The Fifth Circuit Court of Appeals held that an employee with handicaps could not perform the essential functions of his job if his handicap posed a serious safety risk to himself or others.¹⁷⁶ The Sixth Circuit Court of Appeals held that an employee who had a mental impairment that substantially limited his ability to work was not otherwise qualified.¹⁷⁷ The employee's condition rendered him unable to deal with rejection or criticism on the job.

Reasonable Accommodation. The Fourth Circuit Court of Appeals, in reversing a lower court's decision, held that the district court should have made a factual determination as to whether a waiver of the National Teachers Examination as a certification requirement would be a reasonable accommodation for an applicant with learning disabilities.¹⁷⁸ The district court in Maryland held that there were triable factual issues as to whether reasonable accommodations had been made for an employee who suffered from narcolepsy and cardiac arrhythmias.¹⁷⁹ The employee had requested adjustments in her work schedule to allow for flexible starting and quitting times. The Connecticut District Court held that genuine issues of material fact existed as to whether an employee with mental handicaps was reasonably accommodated since he may not have realized that his absences were unexcused or that they jeopardized his job situation.¹⁸⁰

The Sixth Circuit Court of Appeals held that an employee with a mental impairment who was already working on the least stressful job available could not reasonably be accommodated.¹⁸¹ The court held that it was unreasonable to expect the employer to place the employee in a virtually stress-free environment to immunize him from criticism. The Fifth Circuit Court of Appeals held that the city had shown that it could not accommodate an employee whose disability posed a safety risk since officials had exam-

173. *Johnson v. Sullivan*, 764 F. Supp. 1053 (D. Md. 1991).

174. *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 754 F. Supp. 570 (S.D. Ohio 1990).

175. *Walders v. Garrett*, 765 F. Supp. 303 (E.D. Va. 1991).

176. *Chiari v. City of League City*, 920 F.2d 311 (5th Cir. 1991).

177. *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437 (6th Cir. 1991).

178. *Pandazides v. Virginia Bd. of Educ.*, 752 F. Supp. 696 (E.D. Va. 1990), *rev'd* 946 F.2d 345 (4th Cir. 1991); see *supra* note 171 and accompanying text.

179. *Johnson v. Sullivan*, 764 F. Supp. 1053 (D. Md. 1991).

180. *Sedor v. Frank*, 756 F. Supp. 684 (D. Conn. 1991).

181. *Pesterfield v. Tennessee Valley Authority*, 941 F.2d 437 (6th Cir. 1991); see *supra* note 177 and accompanying text.

ined several options and rejected each for legitimate reasons.¹⁸² A New York district court also held that an applicant for a firefighter's position, who could not read at the requisite level due to dyslexia, could not be reasonably accommodated without presenting a safety risk to other persons or property.¹⁸³ A district court in Virginia held that an employee's request, which basically amounted to being allowed to work when her illness permitted, would result in an undue hardship for her employer.¹⁸⁴

Other Section 504 Issues

In a class action lawsuit challenging the institutionalization of developmentally disabled individuals at state operated facilities, the district court in New Mexico held that section 504 does not provide a mentally retarded person with an affirmative right to placement in a noninstitutional setting.¹⁸⁵ However, the court found that the record indicated that the state's community service system discriminated against severely handicapped residents of its institutions since they were denied access to community programs that were made available to their less handicapped peers, on the basis of physical and mental handicaps. The court further found that accommodations that would allow meaningful access could be made without substantial modification.

In continuing action on the DeKalb County School District's refusal to cooperate in an investigation conducted by the Office of Civil Rights, the Eleventh Circuit Court of Appeals affirmed the Secretary of Education's termination of all funding to the county.¹⁸⁶ The court rejected the county's contention that the residential placement regulation of section 504 was invalid. The court stated that it could not determine whether required modifications were reasonable until the Office of Civil Rights had investigated pending complaints. The Secretary's termination of funds for the county's failure to cooperate in that investigation was thus affirmed.

An Ohio district court held that a plaintiff was not required to exhaust administrative remedies under section 504 prior to bringing court action.¹⁸⁷ The court also held that section 1983¹⁸⁸ could be used to remedy injustices

182. *Chari v. City of League City*, 920 F.2d 311 (5th Cir. 311 (5th Cir. 1991); see *supra* note 176 and accompanying text.

183. *DiPompo v. West Point Military Academy*, 770 F. Supp. 887 (S.D.N.Y. 1991). This case was decided on the basis of § 501 of the Rehabilitation Act, 29 U.S.C. § 791, which requires the government to take affirmative steps to ensure that individuals with handicaps have equal access to employment opportunities in the federal government.

184. *Walders v. Garrett*, 765 F. Supp. 303 (E.D. Va. 1991); see *supra* note 175 and accompanying text.

185. *Jackson ex rel. Jackson v. Fort Stanton Hosp. and Training Sch.*, 757 F. Supp. 1243 (D.N.M. 1990).

186. *Freeman v. Cavazos*, 939 F.2d 1527 (11th Cir. 1991). For related decisions see 923 F.2d 1434 (11th Cir. 1991) (denied an emergency stay of the Secretary's termination of funds); *Rogers v. Bennett*, 873 F.2d 1387 (11th Cir. 1989); *THE YEARBOOK OF EDUCATION LAW 1990* at 123.

187. *Pendleton v. Jefferson Local Sch. Dist. Bd. of Educ.*, 754 F. Supp. 570 (S.D. Ohio 1990).

188. 42 U.S.C. § 1983.

under section 504, but that individuals with handicaps were not a suspect class under the equal protection clause.

The Fourth Circuit Court of Appeals, in affirming a lower court's decision, held that section 504 does not permit an award of compensatory damages for pain or suffering and that punitive damages are not recoverable.¹⁸⁹ In an unfortunate case where a student with a congenital heart defect died after being forced by his teacher to run a 350 yard sprint as punishment for talking in line, a Michigan district court also held that section 504 does not permit an award of damages.¹⁹⁰

Since section 504 does not have a statute of limitations for filing a lawsuit under its provisions, one must be borrowed from analogous state law. The Sixth Circuit Court of Appeals held that the appropriate Kentucky statute was one for personal injury suits that must be brought within one year.¹⁹¹ The Vermont District Court held that the appropriate statute in that state was the three year limitations period established for personal injury claims.¹⁹² The district court in Kansas held that the state statute of limitations was two years and that the plaintiff's cause of action accrued when he received a letter informing him that he would not be admitted to medical school.¹⁹³

A district court in Illinois held that the Rehabilitation Act amendment that abrogated the states' Eleventh Amendment immunity from lawsuits in the federal courts for violations of the Act,¹⁹⁴ effectively overturned a previous Supreme Court decision¹⁹⁵ regarding violations that occurred in whole or in part after October 21, 1986.¹⁹⁶ A New York district court also held that a plaintiff's section 504 claims were not barred by the Eleventh Amendment since the alleged violation occurred in part after the effective date of the abrogation amendment.¹⁹⁷

189. *Eastman v. Virginia Polytechnic Inst. and State Univ.*, 732 F. Supp. 665 (W.D. Va. 1990), *aff'd* 939 F.2d 204 (4th Cir. 1991); THE YEARBOOK OF EDUCATION LAW 1991 at 119 & 201.

190. *Waechter v. School Dist. No. 14-030, Cassopolis, Mich.*, 773 F. Supp. 1005 (W.D. Mich. 1991); see *supra* note 162 and accompanying text.

191. *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402 (6th Cir. 1991).

192. *Morse v. University of Vt.*, 776 F. Supp. 844 (D. Vt. 1991).

193. *Baker v. Board of Regents of State of Kan.*, 768 F. Supp. 1436 (D. Kan. 1991). For a related decision see 721 F. Supp. 270 (D. Kan. 1989); THE YEARBOOK OF EDUCATION LAW 1990 at 223.

194. 42 U.S.C. § 2000d-7.

195. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

196. *Joshua B. v. New Trier Township High Sch. Dist.*, 203, 770 F. Supp. 431 (N.D. Ill. 1991).

197. *McGuire v. Switzer*, 734 F. Supp. 99 (S.D.N.Y. 1990).

5

TORTS

William J. Evans, Jr.

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Introduction

The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. This chapter will examine those cases reported during 1991 which involved tort claims within the school context. Included are cases involving school officials, school employees, students, and in some instances others visiting school grounds. Torts arising out of interscholastic sports are not included as they are discussed in another chapter.

The Kansas City school desegregation remedy continues to be the source of numerous court orders and appeals therefrom. An action brought by the state of Missouri unsuccessfully sought reversal of a United States district court order. The State was held responsible for costs related to a revised procedure for funding a desegregation plan, the removal of asbestos from schools being renovated as part of the plan, and cost overruns on construction of a new high school.¹

Negligence

Negligence is established when one's actions fall below a standard of care expected of a reasonable person. The behavior of school personnel is measured against what a reasonable and prudent professional of similar training and experience would have done, or should have done, in the same or similar circumstances. The first case examined in this section involved rather unique litigation.

An action was brought on behalf of an Indiana elementary school student who sought damages for injuries she sustained when her teachers participated in an illegal strike. The complaint alleged she suffered educational deprivation and emotional distress as a result of the teacher's actions. The court dismissed the suit finding that the state legislature had expressly provided remedies for an illegal teacher's strike.²

Injuries

Schools bear the responsibility of maintaining safe and healthy environments in which learning can take place. The following cases, divided into categories according to where or how injury was sustained, illustrate a variety of lawsuits with varying outcomes.

Off School Property and After School Hours. A Florida student was directed to be in front of her school before the school opened so she could be transported to an arts program for gifted students. While waiting for the bus she was attacked and raped. The trial court's judgment for the school board was reversed as it was deemed a matter for trial as to whether the school's duty to supervise the student had been breached.³

A New York motorist was struck by an automobile while helping a school bus driver remove from the highway two deer struck by the bus. The motorist's suit against the school district and driver resulted in a judgment for the defendants. On appeal, a new trial was ordered as the court found reversible error in the instruction to the jury that the bus driver's failure to

1. *Jenkins ex rel. Agyei v. Missouri*, 931 F.2d 470 (8th Cir. 1991).

2. *Coons ex rel. Coons v. Kaiser*, 567 N.E.2d 851 (Ind. Ct. App. 1991).

3. *O'Campo v. School Bd. of Dade County*, 589 So. 2d 323 (Fla. Dist. Ct. App. 1991).

place triangle reflectors to the front and rear of the stopped bus was merely evidence of negligence.⁴

Summary judgment was denied to a New York school district, and a trial was ordered in a personal injury suit which arose from an automobile accident involving a school district vehicle. The court found material issues as to whether the motorist's claimed back injury was caused by the present accident or one two years prior for which the motorist had been compensated.⁵

In a third case out of New York, a school district was not found responsible for the sexual assault of an assistant principal where she failed to make claim of a breach of a special duty by the school district in a governmental capacity.⁶

A motorist who struck and killed a child brought an action against a Louisiana school board to recover for severe emotional distress. In finding for the motorist, the court held that the bus driver violated a direct, statutory duty to await the safe passage of the child before deactivating the bus signals or resuming the trip.⁷

School Settings During School Hours. The father of a high school student who committed suicide brought a wrongful death action against two Maryland school counselors. Specifically, the father alleged a breach of duty by the counselors to inform parents of suicidal statements attributed to their child. Summary judgment granted for the counselors was reversed on appeal. The suicide was held foreseeable because the counselors allegedly had direct evidence of the student's intent since some of the student's friends had reported her statements concerning suicide to the counselors. Although the student later denied making the statements, the court concluded that a reasonable person would not have concluded that this removed the possibility of harm.⁸ A New York appeals court found that a city and board of education voluntarily assumed a special duty to protect a student from a neighborhood bully who was often seen on school grounds and who had threatened the student with harm. The court held that the death of the student, at the hands of the bully, was due to a breach of that duty and awarded damages to the student's mother.⁹

An Illinois high school student broke his leg while playing speedball during physical education class. His action against the school district was dismissed, but that decision was reversed on appeal.¹⁰ The district claimed

4. *Goode v. Meyn*, 568 N.Y.S.2d 472 (App. Div. 1991).

5. *Kerns v. Pine Plains Cent. Sch.*, 568 N.Y.S.2d 248 (App. Div. 1991).

6. *Porterfield v. City of N.Y.*, 573 N.Y.S.2d 681 (App. Div. 1991).

7. *Clomon v. Monroe City Sch. Bd.*, 572 So. 2d 571 (La. 1990).

8. *Eisel v. Board of Educ. of Montgomery County*, 597 A.2d 447 (Md. 1991).

9. *Greene v. City of N.Y.*, 566 N.Y.S.2d 40 (App. Div. 1991). See *Broward County Sch. Bd. v. Dombrosky*, 579 So. 2d 748 (Fla. Ct. App. 1991) (student successfully appealed for a new trial where the jury may have compromised its verdict and the damage award was inadequate).

10. *Selph v. North Wayne Community Unit Sch. Dist. No. 200*, 581 N.E.2d 898 (Ill. App. Ct. 1991).

the student failed to show that: (1) the injury was one which commonly occurs as a result of the activity; (2) the injury was severe; and (3) the equipment the school district failed to supply would have been fit for the purpose of preventing the injury. Since the plaintiff sued for failure to provide equipment, the court would not address the fitness of the equipment.

Parents of a New York student brought an action to recover for injuries their eighth grade daughter sustained while playing coeducational touch football on a wet field during gym class. The court held that the school did not breach its duty to adequately supervise athletic activities and to assign pupils to exercises which were within their abilities. In addition, no causal relationship was found between the student's injuries and participation of male players as she did not fall as a result of contact with another player.¹¹

An Illinois school district was charged with having negligently failed to maintain a level playground. The action came in the aftermath of an injury sustained by a student who fell because of a rut in the ground. The trial court's dismissal of the case was reversed on appeal and the case was remanded for trial.¹² The responsibility of the district to maintain the playground was not found to be a matter related to discipline and the conduct of schools.

While playing on his school's playground, a North Carolina student was injured when he tripped over a tree root. The court denied the student's claim for damages finding that the school had exercised reasonable care.¹³ The placement of sand around the tree root was not determined to have aggravated a natural condition. Rather, the action served to mitigate it by cushioning the fall of the student.

A Georgia student, who had been cut with a small knife during an altercation with another student, was more seriously injured in a later incident involving the same student. His action for damages was against the assistant principal and county board of education. In upholding a summary judgment against the student, the court failed to find negligence in the inability of the assistant principal to discover the identity of the assailant prior to the end of the school day. In addition, the board's failure to provide any written guidelines on a need to notify police of altercations involving knives was insufficient to prove a claim of negligence.¹⁴

A fourth grade Louisiana student was given permission by her teacher to go to a restroom which was down the hall. While there she was sexually assaulted by a man in a ski mask. The girl's father brought an action against the teacher, principal, and school board. The trial court dismissed the suit against the teacher and principal, but rendered judgment for \$55,000 against the school board. Affirming that decision, the appellate court found a breach of duty by the school board for not providing an official policy against

11. *Snyder v. Morristown Cent. Sch. Dist.* No. 1, 563 N.Y.S.2d 258 (App. Div. 1990).

12. *Sidwell v. Griggsville Community Sch. Dist.* 4, 566 N.E.2d 838 (Ill. App. Ct. 1991).

13. *Waltz v. Wake County Bd. of Educ.*, 409 S.E.2d 106 (N.C. Ct. App. 1991).

14. *Sapp v. Effingham County Bd. of Educ.*, 409 S.E.2d 89 (Ga. Ct. App. 1991).

allowing young children to leave the classroom alone.¹⁵ The court explained that had such a policy been in effect, the teacher would not have been able to employ an inconsistent, haphazard policy of her own.

A self-employed computer repairman brought a negligence action against a California school district for an injury suffered when he slipped on a piece of luncheon meat. At trial, summary judgment was granted in favor of the school district. That decision was reversed on appeal.¹⁶ The court explained that the evidence need not show that the accident must have happened because of someone's negligence, but that in light of past experience the accident probably was caused by the negligence of someone.

In contrast, a Louisiana court held a school board's procedure to have the school hallway checked and cleared after each lunch period was reasonable. Thus a student who alleged she slipped, fell, and was injured because of a liquid negligently left in the hallway was unsuccessful in her action for damages.¹⁷

A South Carolina high school student began to break out in a rash when she would walk past the boy's restroom down the school's hallways. She sought assistance from the school nurse and her guidance counselor. In response to the student's suggestion that the reaction might be to a cleanser used in the boy's restroom, the guidance counselor consulted the custodial crew and learned that two different cleansers were in use. As a test, the counselor put the two types of cleansers in the two counselor offices. The student entered one of the offices without a problem. However, when she entered the other office, she suffered a severe reaction. She later brought a negligence action against the school district. Conflicting medical testimony was given concerning whether exposure to the cleanser led to the student's further medical problems. The court found for the school district, and held that the doctrine of comparative negligence did not apply.¹⁸

Holding that a board of education is not the insurer of the safety of students, a New York court ruled against a third grade student who was injured when she fell while descending stairs at school. The visually impaired student failed to wait for the teacher who regularly escorted her between the school building and her school bus.¹⁹

En route to and from School. While en route to school, a student departed his bus with the intention of riding the remainder of the way in a friend's automobile. After the automobile was involved in an accident, the student sued the New York school district alleging negligent supervision caused his injuries. The court held the supervisory duty owed to the student terminated when he left the bus in contravention of school policy.²⁰

15. *Doe v. City of New Orleans*, 577 So. 2d 1024 (La. Ct. App. 1991).

16. *Brown v. Poway Unified Sch. Dist.*, 284 Cal. Rptr. 854 (Ct. App. 1991).

17. *DeGruy v. Orleans Parish Sch. Bd.*, 573 So. 2d 1188 (La. Ct. App. 1991).

18. *Lee v. Florence County Sch. Dist. Three*, 401 S.E.2d 150 (S.C. 1991).

19. *Mercado v. Board of Educ. of N.Y.*, 563 N.Y.S.2d 450 (App. Div. 1990).

20. *Hurlburt ex rel. Hurlburt v. Noxon*, 565 N.Y.S.2d 683 (Sup. Ct. 1990).

Parents of a child struck by a vehicle while crossing the street on her way home from school sued the Louisiana school board and town. The parents claimed the school failed to fence the grounds in a manner which would funnel children to the crosswalks. They claimed the town was liable for allowing parking along the street by the school obstructing the view of pedestrians and motorists. The trial court's decision for the school and town was reversed as the appeals court found the questions to be matters for a trial.²¹

A Louisiana trial court found a child's mother 60% responsible for injuries her son suffered when he left school while waiting for her to pick him up. On appeal the school board's failure to supervise the child was found to be the sole cause of the injuries.²² The mother's failure to pick up her son was not deemed a proximate cause of the harm done when the child ran out of the school office and was struck by an automobile. The possibility that parents occasionally will not show up on time to get their children at dismissal was found a foreseeable situation for which a school board has the duty to provide supervision.

A wrongful death action was brought against a Nebraska school district following an accident between a pickup truck and a school bus. The accident took place at a rural intersection when the truck drove into the bus which had failed to yield the right of way. Representatives of the deceased truck driver sought reversal of a judgment that the driver was guilty of contributory negligence sufficient to bar recovery. In affirming the decision the court cited evidence of the excessive rate of speed by the decedent.²³

The father of an elementary school student brought suit against a Georgia school district and bus driver after the student was struck by a truck when he departed his school bus. In a reversal of the trial court decision, the appeals court held that the district had not violated its duty to deposit the student at a safe spot.²⁴ The record showed that the driver had followed the mother's instructions to allow the student to disembark from the bus at a location across the highway from the child's grandmother. Furthermore, there had been no previous accidents or other incidents at the stop.

School Buildings and Grounds. A high school student was killed when the soccer goalpost he and his companions were playing with fell on his head. His mother brought suit against the school district alleging that it negligently failed to warn of the post's danger. The Ohio Supreme Court held that the student had not come to the soccer field to engage in any type of recreational

21. *Gary ex rel. Gary v. Meche*, 577 So. 2d 833 (La. Ct. App. 1991). See *Tyron v. City of Lowell*, 565 N.E. 2d 456 (Mass. Ct. App. 1991) (it was a matter for trial whether a city was negligent in failing to maintain a fence between railroad tracks and a school yard).

22. *Sutton v. Duplessis*, 584 So. 2d 362 (La. Ct. App. 1991).

23. *Stauffer v. School Dist. of Tecumseh*, 473 N.W. 2d 392 (Neb. 1991).

24. *Dupree v. Goodrum*, 410 S.E. 2d 332 (Ga. Ct. App. 1991). See *McEachin v. Wake County Bd. of Educ.*, 399 S.E. 2d 590 (N.C. Ct. App. 1991) (bus driver was not negligent for injuries caused when the emergency brake was accidentally released by another individual).

pursuit which would have made him a recreational user and thus grant the school board immunity. However, since the student had not been invited to the premises, he was a licensee and owed a duty by the owner of the premises only to refrain from wanton and willful conduct. The failure to post a warning that the soccer goal could cause injury was not found to constitute such conduct.²⁵

A child was injured when he was thrown from his bicycle when it struck a metal pipe cap which protruded from a concrete pathway located between a New York schoolyard and a public playground. The court found the sidewalk, as a matter of law, was within the purview of a city pothole law which required written notice to the city as a prerequisite for suit. In addition, the plaintiff could not recover against the board of education as there was no evidence that the board controlled, maintained, or derived any special benefit from the pathway.²⁶

An Ohio student put her hand through a plate glass window in the door of a school building resulting in severe injury to the hand. The student's action for negligence against the school district was unsuccessful. Evidence showed that the plate glass had been installed in 1968, prior to 1977 state and federal codes requiring safety glazing for glass used in school doors. The school had between seventy and 108 windows of this type. There was no history of these windows breaking or causing injury. From this evidence the court concluded that the school district had exercised ordinary care in maintaining and inspecting school premises.²⁷

A different result came out of a Louisiana case in which a student raised her hand to stop a classroom door which another student had closed in front of her. As a result of her hand going through the window in the door, the hand suffered serious irreparable damage. In her action against the school, the trial court's decision for the school was reversed.²⁸ The court held that compliance with existing building codes does not in and of itself relieve the defendant of liability. Even though the school had not experienced any problems with glass panels in its doors before the accident, the school remained liable for failure to replace the panels.

Educational Malpractice

A senior at an Ohio high school elected to take a psychology course in her last semester of school. As a result of failing the course, she was unable to graduate with the rest of her class. She subsequently attended summer school and received her diploma a short time later. An action brought against her teacher alleged educational malpractice. While recognizing teacher

25. *Fuehrer v. Board of Educ. of Westerville City Sch. Dist.*, 574 N.E.2d 448 (Ohio 1991).

26. *Fattorusso v. City of N.Y.*, 570 N.Y.S.2d 636 (App. Div. 1991).

27. *Goldstein v. Moisse*, 572 N.E.2d 195 (Ohio Ct. App. 1989).

28. *Turner v. Pointe Coupee Parish Sch. Bd.*, 577 So. 2d 755 (La. Ct. App. 1991).

omissions were a cause of the student's problems in psychology there was not evidence that the conduct was the proximate cause of her failing the course. The court indicated that the professional judgment of educators in determining appropriate teaching methods should not be disturbed. Even if the plaintiff had been able to establish proximate cause, the court held that she could not prevail as a matter of public policy.²⁹

Negligence Defenses

In suits alleging negligence, the defendant school district, administrator, or teacher has a number of defenses available to overcome the claim. These range from immunity—either common law sovereign immunity or statutory immunity—to the more usual affirmative defenses. The motivation behind immunity is to limit the flow of public money to private citizens because liability payments will detract from the education functions of the schools. Affirmative defenses keep the plaintiffs from recovering for behavior that in some way was responsible for the injury that occurred.

Immunity

Common Law (Governmental Immunity). Since school districts are state agencies created by state law to perform a governmental function, courts traditionally have been reluctant to disturb this defense. In only one of the five cases reported was the plaintiff successful in challenging governmental immunity.

The immunity defense had mixed results in an Oregon case where a student brought a negligence action after she was injured in a knife fight with another student.³⁰ The court held the school district and officials to be immune from charges that the school's security policy was inadequate. Decisions about security are policy choices made by a person entitled to exercise governmental discretion. However, the district and officials were not found entitled to immunity from the claims of failure to supervise students as this involves routine day-to-day decisions rather than those of a discretionary nature.

A Pennsylvania high school student sought damages for injuries he sustained while using a table saw during woodshop class.³¹ In upholding the trial court's summary decision in favor of the school district, the appellate court failed to conclude that the saw was a part of the school's realty and thus no real property exception to the school's sovereign immunity existed.

29. *Poe v. Hamilton*, 565 N.E.2d 887 (Ohio Ct. App. 1990).

30. *Mosley v. Portland Sch. Dist.*, No. 11, 813 P.2d 71 (Or. Ct. App. 1991).

31. *Wilson v. Ridgway Area Sch. Dist.*, 596 A.2d 1161 (Pa. Commw. Ct. 1991).

The mother of a Michigan student slipped on ice while dropping her child off at school. Her action for damages was against the school board and custodian. The court held that the public building exception to governmental immunity did not apply where the dangerous condition existed on school grounds adjacent to the school building rather than in the school building itself. Furthermore, the natural accumulation doctrine provides that there was not a duty to remove the natural accumulation of ice from the location where the parent slipped.³²

The decision of a school board to adopt an open campus policy was found to be a discretionary activity from which a board was immune from tort liability.³³ Therefore, a Connecticut student who was injured in an automobile accident after he left school grounds was unable to state a cause of action.

A Texas trial court found a school district immune from liability for injuries incurred by a six-year-old student who was hit by an automobile after being dropped off at the wrong bus stop. That decision was reversed on appeal and the case remanded for trial.³⁴ The court held the mother's contention that the accident arose out of the operation or use of a motor-driven vehicle by the school district raised issues of fact as to whether the school district enjoyed sovereign immunity from liability.

Statutory Immunity. An elementary school student was injured during an "outdoor school" program sponsored by a California county board of education. An action brought by the student's guardian was dismissed and then successfully appealed and the case was remanded for trial.³⁵ The off-campus program was shown to be part of the required curriculum, therefore the board was not statutorily immune from liability.

Whether a ladder, permanently attached to a roof and installed near a skylight, created a real property exception to a school district's governmental immunity was the issue in a Pennsylvania case. A roofing worker was injured when he stepped from the ladder and fell through the skylight. The court found it an issue for trial whether the placement of the ladder was a negligent defect in the real estate for which the school district could be held liable.³⁶

A fourteen-year-old student was severely injured and disfigured when he lost control of his bicycle in a gravel storm sewer ditch and struck a concrete cylinder drain capped by a manhole cover. The storm ditch was surrounded on both sides by a public playground operated by a Pennsylvania borough and school district. The court found that the school district and borough were not entitled to immunity under the Recreation Use of Land and Water Act.³⁷ The Act did not apply because the urban recreational facility was constructed as a playground.

32. *Hall v. Detroit Bd. of Educ.*, 465 N.W.2d 12 (Mich. Ct. App. 1990).

33. *Heigl v. Board of Educ. of the Town of New Canaan*, 587 A.2d 423 (Conn. 1991).

34. *Contreras v. Lufkin Indep. Sch. Dist.*, 810 S.W.2d 23 (Tex. Ct. App. 1991).

35. *Salcedo v. Monterey County Office of Educ.*, 1 Cal. Rptr. 2d 868 (Dist. Ct. App. 1991).

36. *Kelly v. Curwensville Area High Sch.*, 595 A.2d 787 (Pa. Commw. Ct. 1991).

37. *DiMino ex rel. DiMino v. Borough of Pottstown*, 598 A.2d 357 (Pa. Commw. Ct. 1991).

A child who was injured when he fell down steps at a school brought an action against a Missouri school board. The action was brought pursuant to state law providing a waiver of immunity for injuries resulting from the dangerous condition of property. In affirming the trial court decision for the child, the appellate court held that the district's case was not prejudiced by jury instructions using the term "not reasonably safe," rather than "dangerous condition."³⁸

Suit was brought on behalf of a mentally retarded six-year-old girl who allegedly was a sexual abuse victim of a school bus driver. The action against the driver, school bus transportation service, and school district was unsuccessful and appeal was sought. The court held that the district was not entitled to discretionary function immunity under the Kansas Tort Claims Act as there was a failure by the school board to follow mandatory child abuse reporting guidelines.³⁹

A Michigan child was injured on a school playground when a basketball hoop fell and struck him. In his suit for damages, a public building exception to governmental immunity was sought. In denying the claim, the court held that the public building exception no longer applies to dangers on school property adjacent to a public school building.⁴⁰

A child slipped on a muddy field while voluntarily playing football in a program sponsored by a California school board. In the negligence suit brought on his behalf, the child was held a "recreational user" engaged in a "recreational pursuit" as defined by statute,⁴¹ which also provided the board with derivative immunity.⁴²

Two Illinois schools shared an athletic field, including adjoining football fields. On a regular school day, the two fields were being used simultaneously for boy's football games. When a student ran off his own field, he collided with a student on the other field causing serious and permanent injuries to that student's head. The dismissal of the student's action against the school district and board of education was upheld on appeal.⁴³ The immunity provided to teachers and certified educational employees, arising from their negligent conduct, was found vicariously applicable to the defendants. Additionally, the defective equipment exception to immunity did not extend to allegedly defective premises. Finally, the student failed to show that the use of the field, even if negligent, rose to the level of willful and wanton misconduct.

During his carpentry class, an Ohio high school student was injured while using a power joiner. The school district against which he brought suit

38. *Dennis ex rel. Dennis v. St. Louis Bd. of Educ.*, 809 S.W.2d 20 (Mo. Ct. App. 1991).

39. *Kansas State Bank & Trust Co. v. Specialized Transp. Serv. Inc.*, 819 P.2d 587 (Kan. 1991).

40. *Eberhard v. St. Johns Pub. Schs.*, 473 N.W.2d 745 (Mich. Ct. App. 1991).

41. R.C. §§ 1533.18(B), 1533.181.

42. *Wheeler v. Lakewood Bd. of Educ.*, 573 N.E.2d 1169 (Ohio Ct. App. 1991).

43. *Ward v. Community Unit Sch. Dist. No. 220*, 572 N.E.2d 986 (Ill. App. Ct. 1991).

successfully used an immunity defense.⁴⁴ The court held the teacher's method of instruction, as well as the maintenance and inspection of the power joiner, to be discretionary acts for which the school district was immune from liability.

An action was brought to hold a Florida school board liable for the conduct of a music teacher who was a member of a satanic cult and had performed satanic acts on students, including sexual abuses and batteries. The decision for the school board was upheld on appeal.⁴⁵ The court recognized that a governmental entity could be liable if the conduct was of the same general nature as that authorized, or if it was incidental to the conduct authorized. However, satanic rituals were not authorized and the teacher was seen as acting outside the scope of his employment with a willful and wanton disregard for human life.

Other Defenses

Comparative Negligence. A suit was brought against a school district insurer for the death of a fourteen-year-old Arkansas student who was struck by a truck while crossing a highway after being discharged from his bus. The trial court jury apportioned the school district 90% at fault and the child 10% at fault. On appeal, the court held that the striking of the child by a truck was not an intervening cause so as to relieve the school district of liability.⁴⁶

Notice of Claim. In increasing numbers plaintiffs continue to seek the right to file a late notice of claim. Seventeen cases were reported, a number of which were decided on largely technical grounds.⁴⁷ In seven instances plaintiffs were successful. The first case reported was brought by, rather than against, a school district.

The construction of a public school building by a school district was found a sovereign activity by the Wyoming Supreme Court. As such, a suit against an architect for damages arising out of construction is brought to vindicate public rights. Under this principle, applicable statutes of limitations cannot bar the school district from bringing its action to protect the public rights.⁴⁸

44. *Banchich v. Port Clinton Pub. Sch. Dist.*, 581 N.E.2d 1103 (Ohio Ct. App. 1991).

45. *Duyser ex rel. Duyser v. School Bd. of Broward County*, 573 So. 2d 130 (Fla. Dist. Ct. App. 1991).

46. *State Farm Mut. Ins. Co. v. Pharr*, 808 S.W.2d 769 (Ark. 1991). See *City of Riviera Beach v. Palm Beach County Sch. Bd.*, 584 So. 2d 84 (Fla. Dist. Ct. App. 1991) (it was held to be a jury question whether a school board was liable for contributing to injuries sustained by a student).

47. See *Cole v. Ruidoso Mun. Schs.*, 137 F.R.D. 357 (D.N.M. 1991); *Byron Community Unit Sch. No. 226 v. Dunham-Bush, Inc.*, 574 N.E.2d 1383 (Ill. App. Ct. 1991); *Rutigliano v. Board of Educ. of N.Y.*, 575 N.Y.S.2d 339 (App. Div. 1991); *Fields v. Fairbanks N. Star Borough*, 818 P.2d 658 (Alaska 1991); *Simmons v. Board of Educ., Union Free Sch. Dist. No. 17*, 564 N.Y.S.2d 477 (App. Div. 1991).

48. *Laramie County Sch. Dist. No. One ex rel. Brown v. Muir*, 808 P.2d 797 (Wyo. 1991).

Three former high school students sued their former teacher, school district, and three other teachers alleging sexual abuse ten years earlier. The trial court granted the defendant's motion for a summary judgment and the students appealed. The court upheld the dismissal of the claim against the district, but not against the teachers who allegedly were aware of the abuse. Additionally, triable issues were found concerning the student's delayed discovery of the wrongness of the teacher's actions. The delayed discovery rule, if applicable, would provide that the statute of limitations does not begin to run until the plaintiff discovers, or reasonably should have discovered, the facts essential to the cause of action.⁴⁹

A North Dakota school district brought an action which related to the use of asbestos in the construction of a school building twenty-three years earlier. A six-year statute of limitations was not found to accrue until the aggrieved party discovered the facts which constituted the basis for the cause of action.⁵⁰

A New York resident was injured during a basketball game on an elementary school court. His application to serve a late notice of claim was upheld on appeal.⁵¹ Although the school district's superintendent was a participant in the game, the district contended that it was deprived of actual knowledge of the injury as the superintendent was not acting in his official capacity at the time. That contention was rejected by the court as the superintendent's presence gave him knowledge of the essential facts of the claim.

A New York high school student was injured while attending a school dance. She was successful in her attempt to file a late notice of claim as the court found that the school district had knowledge of the facts constituting the claim. The incident had occurred on school property from which an ambulance transported the student to a hospital after her accident.⁵²

A New York contractor brought an action against a city board of education seeking payment for extra work. The trial court's dismissal of the case for failure to serve a timely notice of claim was reversed on appeal.⁵³ The court held that in actions involving construction claims the three-month period for filing notice of claim commences at the time the contractor's damages become ascertainable, rather than the date the board refuses payment.

49. *Daly v. Derriek*, 281 Cal. Rptr 709 (Ct. App. 1991). See *Callahan v. State*, 464 N.W.2d 268 (Iowa 1990) (when the mother, not the child, became aware of the child's abuse was the determinant of notice).

50. *Hebron Pub. Sch. Dist. No. 13 of Morton County v. United States Gypsum Co.*, 475 N.W.2d 120 (N.D. 1991). For a case with similar facts and outcome see *Independent Sch. Dist. No. 197 v. W.R. Grace & Co.*, 752 F. Supp 286 (D. Minn. 1990).

51. *Ambrosano v. Canajoharie Cent. Sch. Dist.*, 571 N.Y.S.2d 612 (App. Div. 1991). See *Nayyar v. Board of Educ. of N.Y.*, 564 N.Y.S.2d 762 (App. Div. 1991) (court improvidently exercised its discretion in denying a teacher permission to serve a late notice of claim).

52. *Frazzetta v. Rondout Valley Cent. Sch. Dist.*, 563 N.Y.S.2d 533 (App. Div. 1990).

53. *G.A. Contractors, Inc. v. Board of Educ. of N.Y.*, 575 N.Y.S.2d 334 (App. Div. 1991).

In a Massachusetts case, plaintiffs in a tort action against a regional school committee were found to have satisfied a statute requiring that a public employer be given presuit notice of claim by mailing a claim letter to the chairperson of the school committee. This was despite the fact that the notice should have been sent to individual school committee members.⁵⁴

In New York, a high school student was injured while helping a gym teacher move tables. His action for damages was barred by the court as untimely. There was no finding demonstrating that fraud or deception induced the student to refrain from commencing the action within the statute of limitations.⁵⁵

A pupil who was injured in a school bus accident brought an action under South Carolina's state tort claims act. The court entered summary judgment against the pupil.⁵⁶ Since neither the pupil accident claim nor school bus accident report were supported by oath, they could not be considered verified so as to qualify as a claim which would have invoked a three-year limitation period.

Although the infancy of a plaintiff can serve to allow a late notice of claim, a New York case showed that the court is not deprived of its discretion in deciding such matters. An infant's mother brought an action for damages alleging sexual abuse of the child seven years before. The court held that the mother failed to allege facts within ninety days or a reasonable time thereafter establishing that the school district had knowledge of the facts constituting the claim.⁵⁷

In a complex litigation, consisting of three consolidated cases in which school districts brought actions against asbestos manufacturers, an amendment sought to add an additional manufacturer to the complaint.⁵⁸ The court denied the motion finding it exceeded the statute of limitations. The additional manufacturer was not found to relate back to that firm's parent company for time limitation purposes.

A New York employee's action for breach of warranty and strict products liability against his school district and an asbestos manufacturer was barred as untimely. That decision was upheld on appeal.⁵⁹ A state Toxic Tort Revival Act, which revived claims arising out of exposure to asbestos which were barred by statute of limitations, was not applicable as the employee's action was not time barred prior to the effective date in the statute.

A construction company's action against a New York board of education to recover damages from a construction contract was barred by a failure to

54. *Perez v. Amherst-Pelham Regional Sch. Comm.*, 572 N.E.2d 566 (Mass. 1991).

55. *Montelione v. Greenburg Edgemont Union Free Sch. Dist. at Scarsdale*, 572 N.Y.S.2d 17 (App. Div. 1991).

56. *Searcy v. South Carolina Dep't of Educ., Transp. Div.*, 402 S.E.2d 486 (S.C. Ct. App. 1991).

57. *Bleon v. Herrick Union Free Sch. Dist.*, 571 N.Y.S.2d 527 (App. Div. 1991).

58. *In re Asbestos Sch. Litigation*, 768 F. Supp. 146 (E.D. Pa. 1991).

59. *Vine v. John Manville Sales Corp.*, 572 N.Y.S.2d 452 (App. Div. 1991).

timely serve a notice of claim.⁶⁰ An application and certification of payment, purported to be a notice of claim, was directed to a person to whom no authority was given to receive such notice. Service of the complaint three months later was not found to excuse the failure in serving a late notice of claim.

Liability Insurance

In Montana, suit was brought by a student injured in physical education class. The court pointed to the discretion given the school district with regard to the type and limits of insurance carried and held that the district waived its immunity to the extent of its purchase of liability insurance.⁶¹

While marking shot-put landing points on a school playground, an elementary student was struck in the head by the shot-put of a teacher. While the Montana school district and teacher were found statutorily immune from liability, again the district's purchase of liability insurance waived its immunity to the extent of coverage granted by the pertinent policies.⁶²

Similarly, a case was remanded for trial where a Maine student was injured during physical education class while playing soccer on a muddy field. The appellate court found genuine issues of material fact regarding the scope of liability insurance provided by a public self funded insurance pool.⁶³

The fund that provided liability insurance for a South Carolina school district brought an action seeking judgment that the chairman of a school board's finance committee was not an additional insured to whom coverage was extended. The court held that the board member was acting in the course of his employment when he called a press conference to voice concern over school district finances. The phrase "legally obligated" to pay damages was held broad enough to cover an award of punitive damages.⁶⁴

60. *Accen Constr. Corp. v. Port Washington Union Free Sch. Dist.*, 570 N.Y.S.2d 628 (App. Div. 1991). See *Prote Contracting Co. v. Board of Educ. of N.Y.*, 567 N.Y.S.2d 687 (App. Div. 1991) (contractor's claim against the board accrued upon completion of work); *Peach Laboratories, Inc. v. Irvington Union Free Sch. Dist.*, 565 N.Y.S.2d 967 (Sup. Ct. 1991) (plaintiff was not entitled to late notice of claim having waited six months after learning of the notice of claim requirement before filing).

61. *Crowell v. School Dist. No. 7 of Gallatin County*, 805 P.2d 522 (Mont. 1991).

62. *Hedges ex rel. Hedges v. Swan Lake and Salmon Prairie Sch. Dist.* No. 73, 812 P.2d 334 (Mont. 1991).

63. *Stretton v. City of Lewiston*, 588 A.2d 739 (Me. 1991). See *Winstead v. Uniondale Union Free Sch. Dist.*, 565 N.Y.S.2d 845 (App. Div. 1991). Delays in notifying the insurer precluded summary judgment that the insurer had a duty to defend a personal injury action.

64. *South Carolina State Budget & Control Bd. v. Prince*, 403 S.E.2d 643 (S.C. 1991).

Attorney Fees

In an action against an Alaskan school district a newspaper was found to be a public interest litigant entitled to recover attorney fees.⁶⁵

A Pennsylvania school board member brought an action against the insurers for the school board to recover legal fees incurred in appealing a judgment against the school board. The court held that the insurers were not obligated to provide for expenses involved in an appeal by an individual board member where the judgment had been rendered against the board collectively, and the board collectively had decided not to appeal.⁶⁶

The owner of a car that was searched by police in a school parking lot unsuccessfully brought a civil rights action against a Texas school district. The district was awarded attorney fees on the basis that the action was frivolously brought solely for the purpose of harassing the defendants.⁶⁷

A Utah school bus driver negligently allowed his vehicle to strike the rear end of an automobile, after which the automobile driver made a claim for injuries and property damage. That claim was dismissed, however, with the discovery that he had made an insurance claim on a rear-end accident a few weeks prior to the bus accident, and that he was injured in a motorcycle accident six-months after the bus accident. A subsequent action awarded attorney fees against the claimant as he was determined to have attributed property and personal injuries occurring in other accidents to the accident involved in the present lawsuit.⁶⁸

After a successful plaintiff class action in a school desegregation case,⁶⁹ suit was brought for an award of postjudgment interest. The court held that the plaintiff class was entitled to interest on its attorney fees accruing from the date the court first determined that the class was entitled to an award of fees.⁷⁰

The judge in a West Virginia case was found to have abused his discretion in reducing an award of attorney fees to fifty dollars an hour amounting to a reduction of over \$18,000. The decision summarized twelve areas of consideration appropriately used in assessing reasonable attorney fees.⁷¹

65. *Anchorage Daily News v. Anchorage Sch. Dist.*, 803 P.2d 402 (Alaska 1990).

66. *Youngman v. CNA Ins. Co.*, 585 A.2d 511 (Pa. Super. Ct. 1991).

67. *Jennings v. Joshua Indep. Sch. Dist.*, 948 F.2d 194 (5th Cir. 1991).

68. *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991).

69. *Jenkins ex rel. Agyei v. Missouri*, 593 F. Supp. 1495 (W.D. Mo. 1984).

70. *Jenkins ex rel. Agyei v. Missouri*, 931 F.2d 1273 (8th Cir. 1991).

71. *State Board of Educ., County of Kanawha v. McCuskey*, 403 S.E.2d 17, 19 (W. Va. 1991). "Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and

Employee Injuries/Workers' Compensation

A New York school board and city were found to have breached a special duty owed a school psychologist who was raped in the school annex building where she maintained an office. In upholding an award of damages for loss of past and future earnings, the court found that reasonable reliance was the critical element in establishing the special duty. The plaintiff was able to establish as a matter of law her reasonable reliance upon their assurances that security measures had been taken for her protection.⁷²

The wife of an Iowa school maintenance worker brought a gross negligence action against her husband's supervisor. She alleged the supervisor's order of her husband to work from a manlift placed in the bed of a pickup truck, despite the presence of high winds, caused the fall which resulted in his death. In reversing the decision for the supervisor and remanding the case for trial, the court found that the issue of fact concerning the supervisor's instruction precluded a summary judgment in an action based on alleged gross negligence.⁷³

A board of education employee brought an action for damages from an injury she sustained when she slipped and fell on spilled coffee in the hallway outside her office. The trial court decision for the employee was reversed on appeal with the court finding that the employee failed to show evidence that the New York school board had either actual or constructive notice of the spill.⁷⁴

A Pennsylvania workfare participant injured his back while employed as a school maintenance worker. His award of workers' compensation benefits was unsuccessfully challenged by the school district.⁷⁵ The court held that, for the purpose of workers' compensation liability, since the district exercised immediate control over the worker, he was their employee rather than one of the Department of Public Welfare.

the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." See also *Little Rock Sch. Dist. v. Arkansas State Bd. of Educ.*, 928 F.2d 248 (8th Cir. 1991) (an award of fees under the Civil Rights Attorney's Fees Awards Act was denied as unjust).

72. *Carole A. v. City of N.Y.*, 565 N.Y.S.2d 169 (App. Div. 1991).

73. *Alden v. Genie Indus.*, 475 N.W.2d 1 (Iowa 1991).

74. *Shildkrou v. Board of Educ. of N.Y.*, 570 N.Y.S.2d 183 (App. Div. 1991).

75. *Chichester Sch. Dist. v. Workmens' Compensation Appeal Bd.*, 592 A.2d 774 (Pa. Commw. Ct. 1991).

A North Carolina school bus driver was injured in an automobile accident in his own automobile after leaving a required meeting for which he received compensation. His suit for benefits was denied as the court held that when the driver left the meeting he was not traveling to a destination required by his employer, nor was he engaged in the furtherance of his employer's business.⁷⁶

A Maine school district unsuccessfully sought review of a commission decision awarding workers' compensation benefits to a teacher for her work-related mental injury.⁷⁷ The district sought determination of benefits through a comparison of the stress encountered by the average employee performing a similar job with the same duties. In this instance that would have been with a gifted and talented teacher who traveled between several schools coordinating a new and controversial program. The court upheld the commission's view that the appropriate comparison was of the stress experienced by the average employee generally.

A Michigan school board employee sought benefits claiming mental disability as a result of on-the-job harassment. The claim was denied, but the workers' compensation appeals board reversed the decision. That decision was reversed by the court of appeals which held that the employee was only entitled to compensation if her disability arose out of an actual event of harassment. The compensation board had based its award solely on the plaintiff's perception of harassment.⁷⁸

A former high school and college baseball player volunteered his services as a pitching coach for a Colorado high school baseball team. He was injured when a foul ball struck him in face and later sought workers' compensation benefits. The court set aside the Industrial Claim Appeals Office decision denying relief. An unsalaried person in the service of a public entity may be considered an employee under the Workers' Compensation Act.⁷⁹

A case in which an Arkansas widow sought compensation benefits for her teacher-husband's death was remanded to the compensation commission for a new decision.⁸⁰ The commission, on second consideration, examined whether there was a close temporal relationship between the husband's heart attack and a stressful work-related examination. Following a denial of

76. *Wright v. Wake County Pub. Schs.*, 405 S.E.2d 228 (N.C. Ct. App. 1991). See *Coppola v. City of Beverly*, 576 N.E.2d 686 (Mass. Ct. App. 1991) (city could not be held strictly liable for exercising its option not to provide workers' compensation benefits).

77. *Caron v. Maine Sch. Admin. Dist.* No. 27, 594 A.2d 560 (Me. 1991).

78. *Greenwood v. Pontiac Bd. of Educ.*, 465 N.W.2d 362 (Mich. Ct. App. 1991).

79. *Goletz v. Mesa County Valley Sch. Dist.* No. 51, 813 P.2d 824 (Colo. Ct. App. 1991).

80. *Mosley v. McGehee Sch. Dist.*, 783 S.W.2d 871 (Ark. Ct. App. 1991).

benefits, the widow sought appeal. Citing substantial evidence, including testimony of the defendant's expert, the appeals court held that the teacher's attack, while sitting in his recliner approximately eighteen hours after taking the test, was not causally related to stress surrounding the test.⁸¹

Compensation benefits were denied to a Wyoming school cafeteria worker who claimed permanent partial disability for a "tennis elbow" condition. The injury occurred over a period of time and arose out of repetitive lifting and stirring motions. The denial of benefits was upheld by the court on the basis that her impairment was not rateable under the American Medical Association Guide to the Evaluation of Permanent Impairment.⁸²

Assault and Battery

A teacher walking on a Texas high school campus was found to be performing an educational duty when assaulted.⁸³ This holding affirmed a decision that convicted a defendant of the assault.⁸⁴

A decision in which a juvenile was found delinquent for two counts of battery on a school board employee was reversed and remanded for a new trial.⁸⁵ Evidence showed that the alleged batteries took place on the sidewalk in front of the Florida school, an area monitored by school officials. However, the court concluded that the act did not occur "on school property" within the meaning of the applicable statute.

Defamation/Invasion of Privacy

A former Pennsylvania school administrator also raised the issue of the effect of alleged defamatory statements on future employment. He additionally sought to show that the statements were a result of conspiracy by two superintendents for whom he had worked. He was unable to sustain a charge of conspiracy, but he was successful in establishing that some of the statements offered by the two superintendents as opinion implied factual statements capable of defamatory meaning. The case was remanded for proceedings consistent with that finding.⁸⁶

81. Mosley v. McGehee Sch. Dist., 816 S.W.2d 891 (Ark. Ct. App. 1991) (*en banc*).

82. Allen v. Natrona County Sch. Dist No. One, 811 P.2d 1 (Wyo. 1991).

83. TEX. PENAL CODE ANN. §§ 22.01(a)(3), 22.01(d)(1).

84. Trujillo v. State, 809 S.W.2d 593 (Tex. Ct. App. 1991).

85. Z.B. v. State, 576 So. 2d 1356 (Fla. Ct. App. 1991).

86. Petula v. Mellody, 588 A.2d 102 (Pa. Commw. Ct. 1991).

A former high school guidance counselor successfully brought an action for libel against a New York school district and school employees.⁸⁷ A memorandum stating that the counselor had stolen a number of calendar books from the school was related by a school employee to persons both inside and outside the school. The court found the memorandum to be defamatory as it imputed the plaintiff with the commission of an indictable crime. Such accusations, even in the form of an opinion, are not constitutionally protected.

A high school principal brought an action against a New York teacher's union and union president alleging defamation and intentional infliction of emotional distress. At issue were union newsletter articles which provided a summary of testimony of union witnesses and the findings of an administrative law judge charging that the school board, through the principal, had engaged in improper employer practices. In dismissing the complaint, the court found that the publications were absolutely privileged explaining that to qualify for absolute privilege, the article need not be a verbatim report, but must be substantially accurate.⁸⁸

A former director of support services for a Missouri school district alleged defamation and intentional interference with business expectancy against a newspaper publisher and an author of articles. The dismissal of the libel count and summary judgment for the defendants on the interference count were upheld on appeal.⁸⁹ The court found that the remarks regarding the director's conduct in bid and personnel recommendations were not defamatory *per se*. Therefore, the defendants could not be held liable for intentionally interfering with the plaintiff's potential employment by another school district.

A South Carolina school board member held a news conference for the stated purpose of attracting public attention to "an apparent pattern of malfeasance, fraud, mismanagement, illegal bid-solicitation practices, kick-backs, and bribery" within the present school board administration. Two members successfully brought suit for defamation, conspiracy, and republication of defamatory remarks. That decision was reversed on appeal as the multi-million dollar award by the jury was found excessive.⁹⁰ The court found the verdict arbitrary and capricious, and grossly excessive so as to indicate prejudice or other improper motive.

Parents of a Pennsylvania child had their son evaluated by a certified psychologist after they were informed by school administrators of the district's intention to have the boy repeat the third grade. After it was determined that the child was learning disabled, the parents sought reimbursement from the school district for the cost of the evaluation. The matter

87. *Angel v. Levittown Sch. Dist. No. 5*, 567 N.Y.S.2d 490 (App. Div. 1991).

88. *Leder v. Feldman*, 569 N.Y.S.2d 702 (App. Div. 1991).

89. *Capobianco v. Pulitzer Publishing Co.*, 812 S.W.2d 852 (Mo. Ct. App. 1991).

90. *Sanders v. Prince*, 403 S.E.2d 640 (S.C. 1991).

was discussed at an open meeting of the school board and was reported in two articles by a local newspaper. Alleging an invasion of their privacy, the parents brought an action against the newspaper and reporter. The complaint was dismissed as the court found the request for reimbursement newsworthy, and the articles not an actionable invasion of privacy.⁹¹

Three Pennsylvania school board members brought a libel action against a newspaper and columnist to recover for an article which they claimed compared them with hardened criminals. The article expressed regret that the newspaper printed a picture of two board members who were smiling after being convicted of breaking the sunshine law. The court found the article's discussion of the photograph to be an expression of opinion and not defamatory.⁹²

Tortious Interference with a Contract

The purchaser of a school building claimed the school district failed to disclose the presence of asbestos in the building. The trial court dismissed the purchaser's action against the district, a decision which was modified on appeal. The appeals court ruled that misrepresentation by school employees to an engineering/architectural firm employed by the purchaser could be the basis of a possible contribution claim against the school district.⁹³

Products Liability

A child who fell from a school playground slide brought a products liability action against the manufacturer's successor. The manufacturer's motion for summary judgment was granted in part as the court held that issues of fact existed as to whether intervening acts and omissions of the school proximately caused the child's injuries. However, the court concluded that the successor could be held liable for defects in the slide manufactured by its predecessor. In addition, the knowledgeable purchaser defense was not available to the successor.⁹⁴

A New Jersey board of education brought an action against an asbestos manufacturer to recover costs of removal. Summary judgment granted to the manufacturer was reversed on appeal and the case was remanded for trial.⁹⁵ The court explained that most states have used a standard under which even a consumer cannot recover in strict liability for economic loss. In New

91. *Culver ex rel. Culver v. Port Allegheny Reporter Argus*, 598 A.2d 54 (Pa. Super. Ct. 1991).

92. *Mathias v. Carpenter*, 587 A.2d 1 (Pa. Super. Ct. 1991).

93. *First Bible Baptist Church, Inc. v. Gates-Chile Cent. Sch. Dist.*, 569 N.Y.S.2d 313 (App. Div. 1991).

94. *Hoover v. Recreation Equipment Corp.*, 763 F. Supp. 210 (N.D. Ohio 1991).

95. *Livingston Bd. of Educ. v. United States Gypsum*, 592 A.2d 653 (N.J. Super. Ct. App. Div. 1991).

Jersey, however, the court was bound by different precedent⁹⁶ under which a consumer had a cause of action for strict tort liability. In its reversal, the court cited a combination of factors: (1) that the school building owner is a public entity which does not have a business interest in recovering lost profits; (2) that, while the product did not fail to perform its bargained for function, it was defective since it exposed building users to unforeseen but potentially grave personal risk; and (3) that the losses alleged can extend beyond the offending product to include damages to the surrounding property. Finally, as a state agency the school district was not subject to a statute of limitations.

A nationwide asbestos case was brought by school districts against approximately fifty defendants, three of which made offers to settle. Nonsettling defendants appealed the court approval of the settlement. The appellate court held that the nonsettling defendants lacked standing to challenge the agreement.⁹⁷ An Oregon school district was unsuccessful in its action against suppliers to recover for damage caused by asbestos-containing products in school district buildings.⁹⁸ The district did not satisfy the requirement to identify contracts in order to provide evidence of authenticated contract specifications. The 21,218 pages of documents filed did not correspond in a meaningful manner to materials provided in opposition to the district's motion for reconsideration of the court's ruling.

Construction Contracts

Texas landowners brought an action seeking to recover costs incurred in developing land which they expected to sell to the school district. The court held that there had been no taking of the land, and that governmental immunity could not be avoided on the basis that school trustees had acted fraudulently.⁹⁹

The lowest bidder on a Nevada school construction project brought an action against the school district and board of trustees to obtain a declaration that the contract should be awarded to the lowest bidder.¹⁰⁰ In denying the motion the court explained that its inquiry was limited to an examination of whether the board acted arbitrarily, capriciously, or with an abuse of discretion. The contractor had included in its bid proposal that it intended to do some work for which it was not properly licensed. While the contractor claimed that it had hired a subcontractor for this portion of the work, the board

96. *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965).

97. *In re School Asbestos Litigation*, 921 F.2d 1330 (3d Cir. 1990).

98. *School Dist. No. 1J Multnomah County, Or. v. A C and S, Inc.*, 139 F.R.D. 164 (D. Or. 1991). See *Clarksville-Montgomery County Sch. Sys. v. United States Gypsum Co.*, 925 F.2d 993 (6th Cir. 1991) (jury instruction that a product was not unreasonably dangerous if manufactured in compliance with government and industry standards was proper).

99. *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589 (Tex. Ct. App. 1991).

100. *Bud Mahas Constr., Inc. v. Clark County Sch. Dist.*, 767 F. Supp. 1045 (D. Nev. 1991).

was not informed of this fact. Lacking a showing of arbitrary action, the board's decision was upheld.

A Florida construction company unsuccessfully brought an action for unpaid money on a school construction contract.¹⁰¹ At issue was whether the contract price should be reduced by the amount of money represented by a sales tax which was repealed prior to the contract going into effect. Relying on a theory of mutuality of remedies, the court held that a provision of the contract which provided the contractor relief if applicable taxes were raised was equally applicable to provide relief to the school board when there was a reduction in taxes.

A Louisiana school board undertook a program which involved the construction or repair of numerous school buildings. Included in the specifications was a prevailing wage requirement. An association of general contractors successfully brought suit to enjoin the board from requiring that public works projects contain such a wage provision.¹⁰² The court held that the school district did not have the authority to require the payment of prevailing wage rates. First, the school board's requirement was not incidental under its power to erect school buildings because its interest in obtaining qualified and skilled labor was adequately protected by the lowest responsible bidder language in the Public Bid Law. Second, the school board's requirement constituted a prequalification of bidders which violated the Public Bid Law.

A construction company was awarded a contract for construction of a New York high school. Following school board changes in the projects plans and specifications, the company brought an action to recover delay damages resulting from the changes. The court denied the school board's motion for a summary judgment, a decision which was upheld on appeal.¹⁰³ Evidence of the board's changes in the project's plans, after the contractor's fixed-price bids were accepted, precluded a decision for the defendants.

A New York board of education sought damages for defective roofing work. The supplier's motion for dismissal was affirmed on appeal. The court held that the general release executed by the board, pertaining to any and all claims related to or in connection with the materials, barred the claim by the school board.¹⁰⁴

An Arkansas school district claimed that its insurer and roofing contractor made an oral contract to repair a school gymnasium roof. The district's action to enforce the contract was barred by a three-year statute of limitations for breach of contract. That decision was upheld on appeal as the court found

101. *Pellicano Constr. Co. v. School Bd. of Jefferson County*, 582 So. 2d 1236 (Fla. Ct. App. 1991).
Northampton Area Sch. Dist. v. Skepton, 588 A.2d 1020 (Pa. Commw. Ct. 1991) (whether a contractor had waived rights to arbitration was deemed a matter for the courts).

102. *Louisiana Assoc. Gen. Contractors, Inc. v. Calcasieu Parish Sch. Bd.*, 586 So. 2d 1354 (La. 1991).

103. *Castagna & Son, Inc. v. Board of Educ. of N.Y.*, 570 N.Y.S.2d 286 (App. Div. 1991).

104. *Board of Educ. of N.Y. v. Mars Assoc. Inc.*, 568 N.Y.S.2d 68 (App. Div. 1991).

the five-year limitations period for bringing an action alleging deficient construction or repairs could not be used to extend the three-year limitation.¹⁰⁵

An Arizona school district successfully sought indemnification from a contractor for amounts expended defending and settling a claim by a child who was injured at a building site. The court held that the indemnification clause in the construction contract protected the school district against its own active negligence.¹⁰⁶

Constitutional Torts

An African-American owner of a realty company brought a civil rights action against an Ohio school board alleging intentional racial discrimination. The plaintiff had responded to an advertisement for a plan to market high school property. The board received a total of five proposals, ultimately rejecting the plaintiff's and accepting one of the three proposals retained for further study. All three final proposals were from real estate companies owned by caucasians. The defendant's motion for summary judgment was denied as it relied on statutory immunity which the court found inapplicable to civil rights claims based upon alleged constitutional or statutory violations.¹⁰⁷

A pedestrian was struck by an automobile on a street in front of a Montana School. The building was temporarily in use while awaiting the completion of a new high school. Due to traffic problems in front of the school, a special bus lane had been constructed using barricades and fencing. The injured pedestrian was unable to state a section 1983 claim. The contention that the bus lane in which she was struck was created with deliberate indifference to her welfare was found without merit.¹⁰⁸

The fact that a California board of education president brought a defamation action was not found to have provided the defendant with a basis for a civil rights suit under section 1983. This was true despite the defendant's claim that the suit brought by the board president infringed on his First and Fourteenth Amendment rights by forcing him to endure the burden and expense of defending himself in court.¹⁰⁹

Student Initiated Cases

A civil rights action was brought against a school guidance counselor and vice-principal for allegedly coercing a pregnant Alabama student into

105. *East Poinsett County Sch. Dist. No. 14 v. Union Standard Ins. Co.*, 800 S.W. 2d 415 (Ark. 1990).

106. *Washington Elementary Sch. Dist. No. 6 v. Baglino Corp.*, 817 P.2d 3 (Ariz. 1991).

107. *Craig v. Columbus City Schs.*, 760 F. Supp. 128 (S.D. Ohio 1991).

108. *Irion v. Peterson*, 807 P.2d 714 (Mont. 1991).

109. *Jungherr v. San Francisco Unified Sch. Dist. Bd. of Educ.*, 923 F.2d 743 (9th Cir. 1991).

having an abortion and for failing to notify her parents of the pregnancy or abortion plans. The court found that the counselor and vice-principal were not constitutionally required to notify a pregnant student's or alleged father's parents.¹¹⁰ The facts from the plaintiffs themselves showed that the student made the abortion decision. Allegations of coercion or compulsion, either to have an abortion or to refrain from notifying the parents regarding the pregnancy, were simply not supported by the facts. No federal or state statute or regulation required parental notification as the decision to seek parental guidance was at the student's sole discretion. In addition, the alleged father had no constitutionally protected privacy rights regarding the aborted fetus.

Following an alleged sexual assault on a kindergarten student, an action for damages was brought against the student's teacher and principal.¹¹¹ In affirming the lower court decision, the Supreme Court of Alabama failed to find that either defendant was wantonly negligent in supervising the student. Although there was a serious dispute as to whether the assault actually took place, the constitutional claim under section 1983 was addressed and rejected. Because, as a student, the child was not incarcerated or otherwise institutionalized, the due process clause of the Fourteenth Amendment was not found implicated in the case.

Six Missouri elementary school students alleged sexual abuse at the hands of their teacher. Their section 1983 action was unsuccessful as the court found that the school board could not be held liable absent a showing that it either had knowledge of the teacher's unconstitutional behavior, or that its procedures for addressing child abuse in its schools were inadequate.¹¹² A Colorado high school student sued her county school district and school psychologist alleging that the psychologist sexually molested her.¹¹³ The school district's motion for dismissal was denied. Although no special relationship was recognized which would have imposed an affirmative duty on the district to protect the student, the possibility of deliberate indifference was recognized. It was deemed a matter for trial whether the existence of a custom, practice, or policy caused the deprivation of a constitutional right warranting relief under section 1983.

Employee Initiated Cases

A tenured high school teacher in Puerto Rico brought a section 1983 action alleging a violation of her substantive due process rights as a result of her supervisor's verbal harassment.¹¹⁴ She asserted that her property interest

110. *Arnold v. Board of Educ. of Escambia County*, 754 F. Supp. 853 (S.D. Ala. 1990).

111. *W.L.O. v. Smith*, 585 So. 2d 22 (Ala. 1991).

112. *Thelma D. ex rel. Delores A. v. Board of Educ. of St. Louis*, 934 F.2d 929 (8th Cir. 1991).

113. *Doe v. Douglas County Sch. Dist. RE-1*, 770 F. Supp. 591 (D. Colo. 1991). See *S.M. v. R.B.*, 811 P.2d 1295 (Mont. 1991) (a personal injury case based on alleged sexual abuse of a student was remanded for § 1983 consideration).

114. *Santiago De Castro v. Morales Medina*, 943 F.2d 129 (1st Cir. 1991).

under the Puerto Rico Constitution was entitled to due process protection under the United States Constitution. The court dismissed her claim finding no direct or analogous support that her right to pursue her employment free from emotional health risks warranted due process protection.

After failing to be promoted to any of several administrative positions, including instances where he was the sole finalist with appropriate certification, a Massachusetts teacher brought a section 1983 action against the city and school officials. The defendant's motion for dismissal was granted as the court found no violations of a constitutional magnitude.¹¹⁵ There was no equal protection violation as the plaintiff was unable to establish that the defendants discriminated against a particular class of which he was a member. A "class" designated by the plaintiff, made up of friends, cronies, and others with favorable relationships with decision-makers in the school district, was not deemed applicable. Furthermore, he was unable to show a property/liberty interest to which substantive due process attaches. The denial of his applications for additional administrative positions did not affect his continued employment in the school system.

A Texas school bus driver was suspended with pay after a student accused him of soliciting sex from her. When the driver's contract was not renewed by the district the following year, he brought suit alleging a violation of his civil rights by depriving him of a constitutionally protected liberty or property interest. In denying his claim, the court found he had no property interest in continued employment beyond the term of his existing contract. In addition, the fact that his attorney was unable to attend his name-clearing hearing was not found to have deprived him of a liberty interest.¹¹⁶

An Illinois school principal was injured when she acquiesced to a police request that she allow protesters in front of her school entrance for negotiations. In an action against the city police department, she alleged section 1983 violations. In dismissing the claim, the court held that the police request that the principal unlock the doors during the demonstration was not so dangerous that recklessness could be inferred from the conduct. Due process clauses confer a negative right, the right to be free of government intrusion, not a positive right to be protected from acts by private citizens.¹¹⁷

115. *Coyne v. City of Somerville*, 770 F. Supp. 740 (D. Mass. 1991). See *Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978 (10th Cir. 1991) (Section 1983 action could not be used to assert rights created only by title VII).

116. *Williams v. Conroe Indep. Sch. Dist.*, 809 S.W.2d 954 (Tex. Ct. App. 1991).

117. *Evan v. Morales*, 775 F. Supp. 271 (N.D. Ill. 1991).

6

SPORTS

Linda A. Sharp

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Introduction

This chapter includes all cases, at either the K-12 or higher education levels, which deal with student-athletes, coaches, athletic directors, athletic associations, and booster organizations. However, no case law is discussed which pertains to physical education instruction.

Eligibility

This section contains nine cases: one involved a student who was ineligible to participate because of misconduct, two were ruled ineligible because of age restrictions; two cases dealt with academic eligibility rules; two college students challenged the NCAA "no draft" and "no agent" rules; one case dealt with the standards necessary to uphold the granting of a temporary injunction in a challenge to an eligibility rule; and one case dealt with the nonrenewal of an athletic scholarship.

Discipline

A high school student-athlete attended a student party at the end of the school year at which alcoholic beverages were being served to minors; however, the student-athlete did not consume any alcohol. Under a school rule, however, attendance at such a function was prohibited and the student was banned from swimming in two meets during the next school year. The student-athlete's complaint that this rule impermissibly burdened her First Amendment right of freedom of association was not upheld by the federal district court because this type of association is neither intimate association nor expressive association entitled to constitutional protection. Furthermore, the rule met the rational relationship test under an equal protection claim because the intent of the rule is to prevent peer pressure upon those who are nondrinkers at a social gathering.¹

Age

A Michigan student transferred from a specialized institution for students with emotional and learning disabilities to a parochial high school. The high school athletic association rules on transfer prevented him from playing in interscholastic competition in the first academic year after transfer. The next season the student made the team as a nonstarter. Before the following season, the student was declared ineligible because he would exceed the age restriction. The Michigan High School Athletic Association (MHSAA) denied his petition for a waiver of this restriction.

1. *Bush ex rel. Bush v. Dassel-Cokato Bd. of Educ.*, 745 F. Supp. 562 (D. Minn. 1990).

In the beginning of the academic year, the student was found eligible for special education services. The individualized education plan recommended that the student participate in athletics to help his self-esteem. The student's parents sought an injunction to prevent the MHSAA from enforcing the age regulation against the student. The trial court issued a temporary restraining order and the student played in a number of basketball games. The MHSAA intended to sanction the school for allowing the student to participate by virtue of a MHSAA regulation which allows sanctions to be taken against a school even though the school had permitted the participation because of a court order. The Michigan Court of Appeals found that this regulation was arbitrary, unreasonable, and unlawful. The regulation was a manifest abuse of discretion since its obvious intent is to chill any challenges to the MHSAA regulations.² However, the Michigan Supreme Court reversed the appellate court as it held that the rule in question is a valid restitutive provision which is reasonably designed to rectify competitive inequities that would occur if schools were allowed without penalty to field ineligible athletes under the protection of a TRO.³

In an Arkansas case, a student who would have otherwise been ineligible to participate in athletics due to the state athletic association age rule alleged that he was eligible under a grandfather provision of the rule. However, the grandfather clause contained language that the student must have made "normal progress" through school. The student challenging the rule had repeated the fifth grade at his mother's request and, therefore, did not meet the "normal progress" requirement. The Arkansas Supreme Court upheld the rule and the grandfather clause because there was a rational basis for the grandfather and while the legislature had the right to make distinctions in enactments so long as they were uniformly applied.⁴

Academic Issues

There were two Texas cases which dealt with the "no pass, no play" statute which requires students to meet certain academic standards in order to be eligible to participate in extracurricular activities. In the first case, the Texas Education Agency (TEA) received information that a Dallas high school was allowing students to participate in football even though they were ineligible under the "no pass, no play" law. The TEA found that these allegations were true. However, the superintendent and principal conducted their own investigation which concluded just the opposite. The Deputy Commissioner of Education reviewed the dispute and found that the players

2. See THE YEARBOOK OF EDUCATION LAW 1990 at 157, *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 445 N.W.2d 483 (Mich. Ct. App. 1989).

3. *Cardinal Mooney High Sch. v. Michigan High Sch. Athletic Ass'n*, 467 N.W.2d 21 (Mich. 1991).

4. *Arkansas Activities Ass'n v. Meyer*, 805 S.W.2d 58 (Ark. 1991).

in question were eligible. Thereafter, a school district which had been defeated by this particular Dallas school appealed to the Commissioner of Education who found at least one player ineligible and disqualified the football team.

The Dallas Independent School District filed suit seeking an order enjoining the TEA from interfering with the 1988 championships which had been won by its football team. The trial court entered a permanent injunction which prohibited the TEA from disqualifying the high school on the basis that the Commissioner of Education did not have the authority to determine whether individual students were eligible. Upon appeal, the court held the matter moot since the 1988 championship had long since passed.⁵

In a dispute which has raged for a number of years, a class action was brought to enjoin the enforcement of the "no pass, no play" statute on various constitutional grounds. After a trial court held the statute to be unconstitutional, a direct appeal was taken to the United States Supreme Court. In a *per curiam* decision, a writ of *certiorari* was denied because there was no substantial federal question.⁶

The class action was altered to claim that the statute violated federal law as it applied to disabled students and discriminated against minorities. The Texas Court of Appeals found that the plaintiffs were required to exhaust administrative remedies under the Individuals with Disabilities Education Act. Furthermore, the statute did not violate the equal protection rights or substantive due process rights of the plaintiffs under the Texas Constitution.⁷

Draft Rules

In cases heard by federal district courts in Indiana and Tennessee, two collegiate football players challenged the NCAA rules which provide that student-athletes who enters the National Football League draft are subsequently ineligible for collegiate football. Also, they challenged the rule which forbids student-athletes to retain player agents.

In the Indiana case, a former Notre Dame football player alleged that the aforesaid two rules violated section 1 of the Sherman Antitrust Act (i.e., that these rules were in restraint of trade). The court refused to grant the plaintiff a temporary injunction as it held that under a Rule of Reason analysis, the procompetitive and anticompetitive effects of an alleged restraint of trade must be discussed. Since the rules in question have substantial procompetitive effects in that they advance the goals of focusing athletes' attention on college endeavors and promote the integrity and quality of college football,

5. Texas Educ. Agency v. Dallas Indep. Sch. Dist., 797 S.W.2d 367 (Tex. Ct. App. 1990).

6. Stamos v. Spring Branch Indep. Sch. Dist., 475 U.S. 1001 (1986).

7. Texas Educ. Agency v. Stamos *ex rel.* Class of All Pub. Sch. Children, 817 S.W.2d 378 (Tex. Ct. App. 1991).

the plaintiff could not demonstrate the necessary likelihood of success on his claim to support an injunction.⁸

In the Tennessee case, a former athlete from Vanderbilt University also sought a preliminary injunction claiming an antitrust violation. However, this plaintiff argued that these rules were a forbidden exercise of monopoly power. The district court held that the NCAA has business ventures such as television contracts which are subject to antitrust scrutiny. However, eligibility rules, such as the ones which are in question here, are not subject to antitrust analysis. The overriding purpose of the eligibility rules is not to provide the NCAA with a commercial advantage but just the opposite (i.e., to prevent commercialization from destroying the unique "product" of collegiate football). In *dicta*, the court stated that even if the NCAA were subject to antitrust provisions in this case, the plaintiff could not show the requisite willful acquisition or maintenance of monopoly power. Plaintiff's preliminary injunction was denied.⁹

Injunctive Relief

In a case out of Florida, a high school student sought a temporary restraining order to prevent a school from denying his participation in football for the rest of the season after he had been ruled ineligible to participate. The circuit court granted the TRO after it found that not doing so would cause irreparable harm. The District Court of Appeals reversed this decision because the lower court did not find that there was a likelihood of success on the merits of the plaintiff's constitutional law claims. Therefore, the order was erroneous because the trial court ignored fundamental principles of law in granting the injunction.¹⁰

Scholarship Nonrenewal

Two football players sued the university for breach of contract when their athletic scholarships were not renewed for their last year of eligibility. The appellate court in Washington held that there was no breach of contract because the scholarship document clearly stated that each award was for one year. However, if an award was not renewed the player(s) involved must be given due process because the scholarship was issued under a representation that it would be renewed subject to certain conditions. This is sufficient to provide a legal claim of entitlement which warrants due process.¹¹

8. Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990).

9. Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990).

10. Florida High Sch. Activities Ass'n v. Adderly, 574 So. 2d 158 (Fla. Dist. Ct. App. 1990).

11. Conard v. University of Wash., 814 P.2d 1242 (Wash. Ct. App. 1991).

Equality of Programs

General

In a case from Montana, female athletes complained of sex discrimination in secondary school programs. The case was dismissed pursuant to a settlement agreement which was prepared with the assistance of a facilitator. However, the federal district court retained continuing jurisdiction to enforce the agreement. Thereafter, the plaintiffs alleged that the agreement was violated since the high school association did not take action to align the girls' basketball and volleyball seasons with the national norm. The court found for the defendants.¹² The Ninth Circuit Court of Appeals affirmed this decision on the basis that the "law of the case" did not mandate the change of seasons.¹³

This seasonal issue recurred again in the above case. The federal district court held that a change in seasons for girls' volleyball and basketball was not necessary to achieve and maintain gender equity.¹⁴

Girl to Play on Boys' Team

In a case dealing with the recovery of attorney fees, a female high school student was prohibited from playing on the boys' soccer team by the rules of the conference and the high school athletic association. The plaintiff successfully obtained a temporary restraining order allowing her to play. However, the next year her complaint was dismissed as moot since she chose to play on the newly-formed girls' soccer team. The plaintiff was not considered to be a prevailing party for the purpose of recovering attorney fees since the TRO was not a favorable ruling on the merits.¹⁵ The Seventh Circuit Court of Appeals affirmed this decision.¹⁶

The issue of attorney fees was also relevant in a case from Louisiana. A female high school freshman was forbidden by the rules of the Louisiana High School Athletic Association (LHSAA) from participating on the boys' baseball team. After filing suit because of this allegedly discriminatory rule, the LHSAA, on its own, changed the rule to allow girls to participate in a boys' sport if the school did not have a comparable girls' sport. The case thus became moot because of this rule change. The plaintiff's motion for attorney fees was then denied by the federal district court. Upon appeal, the Fifth Circuit Court of Appeals held that the district court had jurisdiction to

12. See THE YEARBOOK OF SCHOOL LAW 1987 at 182, *Ridgeway v. Montana High Sch. Ass'n*, 633 F. Supp. 1564 (D. Mont. 1986).

13. See THE YEARBOOK OF EDUCATION LAW 1989 at 160, *Ridgeway v. Montana High Sch. Ass'n*, 858 F.2d 579 (9th Cir. 1988).

14. *Ridgeway v. Montana High Sch. Ass'n*, 749 F. Supp. 1544 (D. Mont. 1990).

15. See THE YEARBOOK OF EDUCATION LAW 1991 at 157, *Libby v. South Inter-Conference Ass'n*, 728 F. Supp. 504 (N.D. Ill. 1990).

16. *Libby ex rel. Libby v. Illinois High Sch. Ass'n*, 921 F.2d 96 (7th Cir. 1990).

determine whether the LHSA's regulations constituted state action. Therefore, attorney fees could be permitted under section 1988 and the matter was reversed and remanded.¹⁷

Boy to Play on Girls' Team

A high school boy who wanted to participate on the girls' field hockey team brought suit against the Rhode Island Interscholastic League (RIIL) because its rules limited field hockey to girls. The federal district court denied the student's motion for a preliminary injunction on the basis that there was no title IX violation because athletic opportunities had not previously been limited for his sex. The plaintiff's equal protection claim failed because redressing disparate athletic opportunities for females is an important governmental interest which would justify the imposition of such a rule. Finally, the court declined to rule on the claims brought under the state constitution because there was no federal subject matter jurisdiction since the federal claims were without merit.¹⁸

Tort

In 1991, there were twenty-seven tort cases dealing with sport. Of these cases, two were intentional torts. Of the negligence cases, eighteen dealt with participants and six cases concerned spectators. There was one product liability action.

Intentional

Assault. A freshman high school football player suffered a broken nose as he underwent a "hazing ritual" at the back of the school bus which was transporting the football team. The bus was driven by the football coach. The student brought a section 1983 action and the federal district court granted the defendant coach's motion for summary judgment. The coach's failure to curtail the hazing was not a violation of substantive due process. Absent state coercion, the coach had no constitutional duty to care for the plaintiff's safety. To hold otherwise would blur the distinction between state law negligence claims and federal constitutional violations.¹⁹

Defamation. The former coach of a women's collegiate basketball team brought a slander action stemming from statements by the athletic director that she had "misappropriated team funds." The appellate court upheld the

17. *Habetz ex rel. Habetz v. Louisiana High Sch. Athletic Ass'n*, 915 F.2d 164 (5th Cir. 1990).

18. *Kleczeck ex rel. Kleczeck v. Rhode Island Interscholastic League, Inc.*, 768 F. Supp. 951 (D.R.I. 1991).

19. *Reeves ex rel. Jones v. Besonen*, 754 F. Supp. 1135 (E.D. Mich. 1991).

jury verdict for the coach although it reduced the award from \$300,000 to \$100,000. The coach, who was not a public figure, was entitled to prevail because the athletic director's statements were made without an investigation into the circumstances surrounding the alleged misappropriations. Therefore, the athletic director was not entitled to a qualified privilege regarding those statements.²⁰

Negligence

Participants. A club team rugby player who became a paraplegic because of injuries sustained in a tournament at defendant university sued in negligence. Summary judgment was affirmed on behalf of the university as the appellate court held that, in the context of a club sport, the university had no affirmative duty to ascertain the level of fitness or preparedness of visiting clubs participating in a tournament.²¹ The Louisiana Supreme Court affirmed the dismissal of the action against the university as it found no special relationship to the plaintiff which would require the university to act to ensure his safety.²²

Three cases from New York dealt with various aspects of negligence law. First, a fifteen year old girl sustained injury as she attempted to kick the ball in a junior varsity soccer game. The student alleged that the injury was caused by three opponents who ran into her; however, the two coaches present stated that at the time she fell, the nearest players to her were six-to-ten feet away. The lower court denied the defendants' motion for summary judgment. This ruling was reversed by the appellate court since it found no breach of duty by the defendants even if the plaintiff's version of the story was accepted as true.²³

In the second New York case, the plaintiff was injured on an allegedly defective court as she played in an intercollegiate tennis match. The defendant university alleged that the plaintiff assumed the risk because she played with the knowledge that the court was defective. The plaintiff, however, argued that she had no choice but to play on this court since she was required to play in all team matches under the terms of her athletic scholarship. The lower court denied the university's motion for summary judgment because the plaintiff's affidavit raised a triable issue of fact regarding the "voluntariness" of her behavior. The appellate court affirmed.²⁴

In 1989 the petitioner, who was on leave from West Point, was injured as he played a game of pick-up basketball on the grounds of an elementary

20. *Moss v. Stockard*, 580 A.2d 1011 (D.C. 1990).

21. See THE YEARBOOK OF EDUCATION LAW 1991 at 160, *Fox v. Board of Supervisors*, 559 So. 2d 850 (La. Ct. App. 1990).

22. *Fox v. Board of Supervisors of La. State Univ.*, 576 So. 2d 978 (La. 1991).

23. *La Mountain v. South Colonie Cent. Sch. Dist.*, 566 N.Y.S.2d 745 (App. Div. 1991).

24. *Conolly v. St. John's Univ.*, 575 N.Y.S.2d 68 (App. Div. 1991).

school. The superintendent of the school system was also a participant in that game. The lower court allowed the petitioner to serve a late notice of claim since the superintendent was present at the time of the accident and had actual knowledge of its occurrence. The appellate division affirmed.²⁵

Recruiting activities by a volunteer, who received no compensation, raised the question of the applicability of *respondeat superior* in a case which arose in Kansas. The volunteer, at the request of a community college basketball coach, picked up a prospective recruit at the airport. Upon leaving the airport, the volunteer ran a stop sign and collided with a truck. The volunteer was killed and the recruit and truck driver were both injured. When faced with the question of whether the volunteer should be considered an employee of the college for the purposes of *respondeat superior*, the federal district court found that he was. Regardless of the person's volunteer status, he was acting for the coach and the coach had the right to control his behavior. At the time of the accident, the volunteer was performing the service for which he had been employed.²⁶

Three Illinois cases dealt with tort law. In the first situation, a sixth grader was hit by a discus thrown by an eighth grader during the warm-up period prior to a track meet. The warm-up period was not supervised and the injured student alleged that this failure of supervision was a breach of duty by the host school. The appellate court reversed the summary judgment which the lower court had granted the defendants. In a strong commentary regarding the foreseeability of injury, the court held that the hazardous nature of discus throwing requires supervision at warm-ups as well as at the meet itself.²⁷

A wrestler injured his knee at practice and the coach, who had no medical training, pulled the student's leg and manipulated the knee. Furthermore, the coach instructed the injured wrestler to practice against a champion collegiate wrestler. The student suffered further injury to his knee necessitating surgery. The appellate court reversed the lower court which had granted the coach's motion to dismiss. The allegations in the complaint were sufficient to allege willful and wanton misconduct which is the Illinois standard to bring suit against a high school coach.²⁸

Finally, the Illinois Appellate Court declined to fashion a new exception to immunity based on "premises liability." Two fields were placed end to end and were often simultaneously used for physical education classes, intramurals, or athletic events. A nine year old student sustained a skull fracture as he sat in the end zone of one of the fields watching an intramural game. An older student ran into him as he caught a football in the adjacent end zone and ran

25. *Ambrosano v. Canojoharie Cent. Sch. Dist.*, 571 N.Y.S.2d 612 (App. Div. 1991).

26. *Foster v. Board of Trustees of Butler County Community College*, 771 F. Supp. 1122 (D. Kan. 1991).

27. *Poelker v. Macon Community Unit Sch. Dist. No. 5*, 571 N.E.2d 479 (Ill. App. Ct. 1991).

28. *Halper v. Vayo*, 568 N.E.2d 914 (Ill. App. Ct. 1991).

through it into the end zone in which the nine year old was sitting. The plaintiff alleged negligence in the design of the fields. However, although Illinois law provides an exception to immunity for defective equipment, the appellate court felt that it would be inappropriate to extend this exception to premises liability questions. Therefore, the lower court's dismissal of this cause of action was affirmed.²⁹

Three other cases dealt with the question of immunity. In Texas, a student drowned when he fell from a sailboat used in the college's sailing course. Under that state's law, a school has immunity except when the injury results from the "operation or use of a motor vehicle." Although the plaintiff attempted to argue that every item of transportation with a motor should be considered a motor vehicle under the above language, the appellate court held that the common usage of the term and case law made it clear that a sailboat is not a motor vehicle. Summary judgment for the defendant college was affirmed.³⁰

In Montana, a twelve year old student was instructed by a teacher to mark the place where shot-puts landed. The student was marking one throw when she was hit by a shot-put thrown by the teacher. The lower court granted summary judgment on behalf of the school district and the teacher on the basis that they were statutorily immune from suit. The Montana Supreme Court, however, ruled that the purchase of liability insurance by the school district waived its immunity to the extent of coverage granted by the policy.³¹

The question of whether a "public building" exception to governmental immunity applied was at the center of a case in which a twelve year old student was injured as a basketball hoop located on a school playground fell and hit him. The appellate court affirmed a summary judgment for the defendant because the "public building" exception is applicable only to dangers presented by a building itself. It is not applicable to dangers on school property adjacent to a public school building.³²

A child suffered serious injuries as he lost control of his bicycle in an open storm ditch located on a playground which was jointly operated by the school district and the borough. The lower court denied the defendants' motion for summary judgment on the basis that they were not immune under the provisions of Pennsylvania's Recreation Use of Land and Water Act (RUA). Upon appeal, this decision was reversed and the district was held to be immune under the RUA.³³ Upon reconsideration, however, this appellate court vacated its prior decision and affirmed the lower court's ruling. The playground in question is a developed facility with improvements and did

29. Ward v. Community Unit Sch. Dist. No. 220, 572 N.E.2d 986 (Ill. App. Ct. 1991).

30. Ozolins v. North Lake Community College, 805 S.W.2d 614 (Tex. Ct. App. 1991).

31. Hedges *ex rel.* Hedges v. Swan Lake and Salmon Prairie Sch. Dist. No. 73, 812 P.2d 334 (Mont. 1991).

32. Eberhard v. St. Johns Pub. Schs., 473 N.W.2d 745 (Mich. Ct. App. 1991).

33. See THE YEARBOOK OF EDUCATION LAW 1990 at 137, DiMino v. Borough of Pottstown, 564 A.2d 1329 (Pa. Commw. Ct. 1989).

not constitute "land" under the RUA. The defendants were, therefore, not immune from suit.³⁴

An Ohio court dealt with the question of whether a minor who fell on a muddy field while playing football in a program sponsored by the board of education may be considered a recreational user. Both the lower court and the appellate court found that the plaintiff was a recreational user thus entitling the defendant board to immunity.³⁵

A ten-year-old child suffered permanent eye damage as he was struck with a hockey stick. The child's mother argued that the school was negligent in allowing him to participate in this activity because she had advised the school that the student was a borderline hemophiliac. The lower court entered judgment on a jury verdict for the defendant. The Oklahoma appellate court reversed and remanded for a new trial because of erroneous instructions regarding the contributory negligence of the child. The student could not be contributorily negligent unless he knew of the danger posed by the activity in question. This issue of the student's knowledge was a jury question.³⁶

A twelve year old boy drowned in a pool owned by a seminary while he was swimming with a group of altar boys. The Pennsylvania Superior Court held that the evidence presented at trial was sufficient to support a breach of duty by the seminary in permitting access to the pool when a competent lifeguard was not present.³⁷

In another drowning incident, a college student died while he participated in a recreational swimming event at the college pool. The jury returned a verdict of \$1,500,000. The appellate court affirmed in part and reversed in part as it held that the deceased student was an invitee to whom the university owed a duty to exercise ordinary and reasonable care for his safety. Whether the inattentiveness of one of the lifeguards was the proximate cause of the student's death was a question for the jury.³⁸

The applicability of insurance coverage to a cheerleader who was hurt while performing a stunt at a school football game was the critical issue in a Louisiana case. The policy in question contained exclusionary language which provided that the insurance coverage was inapplicable to bodily injuries sustained by a person "practicing for/participating in any contest or exhibition of an athletic or sports nature." The trial court held that the above clause excluded coverage for the injury in question. The Louisiana Supreme Court reversed on the basis that the language was intended to apply to the risks normally encountered in a sports contest and not to an ancillary activity

34. *DiMino ex rel. DiMino v. Borough of Pottstown*, 598 A.2d 357 (Pa. Commw. Ct. 1991).

35. *Wheeler v. Lakewood Bd. of Educ.*, 573 N.E.2d 1169 (Ohio Ct. App. 1989).

36. *Lewis v. Dependent Sch. Dist. No. 10 of Pottawatomie County, Okla.*, 808 P.2d 710 (Okla. Ct. App. 1990).

37. *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 580 A.2d 1341 (Pa. Super. Ct. 1990).

38. *Walker v. Daniels*, 407 S.E.2d 70 (Ga. Ct. App. 1991).

such as cheerleading. The exclusionary provision is to be strictly construed and does not apply in this situation.³⁹

In another insurance dispute which involved a cheerleading accident, the plaintiff insurance company sued another insurance company to recover a portion of a \$2 million settlement which it had paid due to the paralysis of a cheerleader. The dispute turned on the construction of a particular clause which was either an "escape" clause or an "excess" clause. Since the language in question was ambiguous, it was construed in favor of the insured. Therefore, the plaintiff company was entitled to contribution from the defendant.⁴⁰

Spectators. Two Pennsylvania cases dealt with spectator injuries. In the first case, a spectator who attended a ceremony prior to a high school football game was hit by an errant football as she walked on a cinder path, which was the only access available to her seat. The trial court held that the real property exception to immunity was not applicable. The appellate court affirmed summary judgment for the school district because the real property exception cannot be used unless there is a defect in the land itself, which was not the case here.⁴¹

Another plaintiff was injured as he fell on a grassy snow covered area as he was en route to a university basketball game. The trial court granted defendant's motion for nonsuit which was affirmed by the appellate court. The plaintiff showed no evidence that the sidewalks or roadways were improperly maintained or inadequate and plaintiff chose to walk upon a grassy area not intended for pedestrians when he fell.⁴²

In Wyoming, a spectator fell on an icy patch of concourse leading to the upper deck of the university's football stadium. The lower court granted summary judgment for the defendants on the basis that the university was immune because ramps or concourses are the equivalent of sidewalks, the maintenance of which are immune under Wyoming statutory law. However, the state supreme court disagreed as it held that the ramps in the stadium were part of a "recreation area." The university is not immune from suit if it is negligent in the maintenance of a recreation area.⁴³

An eleven-year-old boy attended a swim meet at a university. He and two of his friends went to an auxiliary gym to play basketball. He climbed a catwalk to retrieve a basketball and fell sixty feet to the floor beneath. Eighteen months after he reached the age of majority he filed suit which did not meet the time requirements of the Tort Claims Act. The dismissal of the action was affirmed by the Idaho Supreme Court.⁴⁴

39. *Garcia v. St. Bernard Parish Sch. Bd.*, 576 So. 2d 975 (La. 1991).

40. *Horace Mann Ins. Co. v. United Int'l Ins. Co.*, 762 F. Supp. 1470 (M.D. Ala. 1990), *aff'd*, 932 F.2d 1443 (11th Cir. 1991).

41. *Johnson v. Woodland Hills Sch. Dist.*, 582 A.2d 395 (Pa. Commw. Ct. 1990).

42. *Gilligan v. Villanova Univ.*, 584 A.2d 1005 (Pa. Super. Ct. 1991).

43. *DiVenere v. University of Wyo.*, 811 P.2d 273 (Wyo. 1991).

44. *Banks v. University of Idaho*, 798 P.2d 452 (Idaho 1990).

A fourteen year old high school student was killed as he and his friends pushed over a soccer goal located on a school field. The goalpost fell on the decedent's head. The Ohio Supreme Court held that the student was not a "recreational user" making the school immune from suit. However, the student was a licensee and the school board owed only the duty to refrain from willful or wanton misconduct. As a matter of law, the failure to post warnings at the field was not willful or wanton. Therefore, summary judgment for the defendant was affirmed.⁴⁵

A New York case concerned the contractual relationship between a university and the Ice Capades. The Ice Capades leased the university's fieldhouse and a spectator fell outside the fieldhouse after an Ice Capades performance. The university claimed that the insurer of the Ice Capades had agreed to indemnify the university for personal injury such as the fall in question. The appellate court, after a review of the document, decided that the indemnification clause applied only to that part of the premises actually leased. Since the injury occurred in an external area which was not leased to the Ice Capades, there was no obligation to indemnify the university.⁴⁶

Product Liability

A high school football player was severely injured by a blow to the head during football practice. A jury verdict was returned against the manufacturer of the helmet. The denial of a directed verdict for the defendant was proper because sufficient evidence was presented to show that the player suffered exactly the type of injury which the helmet was designed to prevent.⁴⁷

Employment

Eight cases which dealt with employment issues were decided in 1991. Four of these cases dealt with adverse employment decisions, two concerned contract disputes, one was a collective bargaining matter, and one was a workers' compensation claim.

Adverse Employment Decisions

Refusal to Renew Coaching Contract. A high school basketball coach was temporarily removed from coaching pending an investigation into complaints regarding her conduct. Her coaching stipend for the season was paid in full. The federal district court held that she had no right to due process

45. *Fuehrer v. Board of Educ. of Westerville City Sch. Dist.*, 574 N.E.2d 448 (Ohio 1991).

46. *Rensselaer Polytechnic Inst. v. Zurich Amer. Ins. Co.*, 575 N.Y.S.2d 598 (App. Div. 1991).

47. *Austria v. Bike Athletic Co.*, 810 P.2d 1312 (Or. Ct. App. 1991).

since there is no right of renewal for supplementary positions and she did not suffer any loss of a property interest since her stipend was paid in full. Additionally, a liberty interest was not infringed upon since the reason for her removal was not disclosed. Summary judgment for the defendants was granted.⁴⁸

In Pennsylvania, a person who was employed as a physical education teacher for nineteen years also served as the soccer coach for fifteen years. In 1989, the coaching contract was not renewed. The coach filed a grievance which was denied as not being a grievable matter. Upon appeal to arbitration, the school district filed an action in the trial court to enjoin the arbitration. The trial court held that a "coach" is not an employee as defined by the collective bargaining agreement and therefore has no right to arbitrate the matter. The appellate court affirmed.⁴⁹

Immorality. In Iowa, a school board terminated a teacher/coach's contract based on its findings that he had solicited and engaged in sexual relations with a student. Upon appeal to an adjudicator, the dismissal was reversed. The lower court affirmed the board's decision and the teacher/coach appealed. The Iowa Supreme Court held that there was sufficient evidence for termination and affirmed the lower court.⁵⁰

A high school softball coach, who was also a tenured teacher, was removed "for cause" because of his relationships with two female students who were interested in playing on the softball team. He had hugged and kissed the girls, given them a number of presents, and sent them a series of sexually suggestive letters. The hearing officer, however, found that the coach's conduct was remediable and ordered the school district to reinstate him. The lower court upheld the hearing officer. The appellate court found that the coach engaged in immoral conduct by writing overtly sexual letters to the students and that this conduct was irreparable. The lower court was reversed and the dismissal was upheld.⁵¹

Contract Disputes

The plaintiff, a former employee of the University of Illinois Athletic Association, sued under section 1983 because he was discharged from employment. Initially, he sued the Board of Trustees and the athletic director. After the federal district court ruled that those defendants were immune from suit under the Eleventh Amendment, the plaintiff refiled his action naming the athletic association and the athletic director as defendants.

48. *Schneeweis v. Jacobs*, 771 F. Supp. 733 (E.D. Va. 1991).

49. *In re Glover*, 587 A.2d 25 (Pa. Commw. Ct. 1991).

50. *Board of Directors of Fairfield Community Sch. Dist. v. Justmann*, 476 N.W.2d 335 (Iowa 1991).

51. *Board of Educ. of Sparta Community Unit Sch. Dist. No. 140 v. State Bd. of Educ.*, 577 N.E.2d 900 (Ill. App. Ct. 1991).

The athletic association had been merged with the Board of Trustees after the suit was filed. The lower court now found no immunity. However, the Seventh Circuit Court of Appeals found that even though the Board was a successor entity it still enjoyed Eleventh Amendment protection and the defendants were immune from suit.⁵²

Athletic staff members at schools in Arkansas sought judgment for uncompensated wages allegedly due based on a provision in the salary schedule. This provision stated that "extended term contracts" shall be paid on a daily rate of pay multiplied by the days worked. The athletic staff argued that this provision applied to them and that they were due compensation for extra days of work. The school district argued that the "extended term" provisions were applicable only to deans, counselors, and vocational teachers. The appellate court held that the "extended term" provisions were applicable to athletic staff because the work they performed clearly fit within the provision's definition.⁵³

Collective Bargaining

The school district policy in hiring athletic coaches had been to offer vacant positions to teachers in the district before employing outsiders (i.e., walk-ons). In 1986 the baseball team coaching position became vacant. The position was first offered to district employees per the above policy but the position was then filled by a walk-on. This person remained baseball coach through 1989-90 but no annual search was undertaken for a replacement among district employees.

The teachers' association filed a *writ of mandamus* to compel the district to conduct annual searches among district employees. The lower court denied the petition on the basis that the annual search requirement was void because of inconsistency with legislative intent. The appellate court held that the regulation was void because it contravened the statute which gave school districts control over interscholastic athletics and exceeded the statutory power given to the Department of Education regarding general supervision.⁵⁴

Workers' Compensation

In Colorado, a person who served as an unpaid volunteer pitching coach of a baseball team was hit in the face by a foul ball. The appellate court held that an unsalaried person in the service of a public entity is an "employee" for purposes of the workers' compensation statute.⁵⁵

52. *Kroll v. Board of Trustees of Univ. of Ill.*, 934 F.2d 904 (7th Cir. 1991).

53. *Helena-West Helena Sch. Dist. No. 2 v. Randall*, 796 S.W.2d 586 (Ark. Ct. App. 1990).

54. *San Jose Teachers Ass'n v. Barozzi*, 281 Cal. Rptr. 724 (Ct. App. 1991).

55. *Goletz v. Mesa County Valley Sch. Dist. No. 51*, 813 P.2d 824 (Colo. Ct. App. 1991).

Miscellaneous

Public Records

Two Georgia newspapers made an open records request to inspect documents relating to the income of all University of Georgia coaches. These requests covered income received from shoe contracts, sport camps run by the coaches, TV/radio shows, and speaking engagements. The Georgia Supreme Court reviewed thirteen documents to decide whether each activity was conducted "in the course of the operation of a public office or agency," the criterion under the "public records" law. Using this criterion, all of the income mentioned above was subject to disclosure except for the speaking appearances made on behalf of a sporting goods manufacturer.⁵⁶

Using the above case as precedent, the Georgia Supreme Court dealt with an open records request pertaining to coaches' income generating activities at Georgia Tech. In accordance with the previous decision, the court held that consultant contracts were public records subject to disclosure. However, appearance contracts were private matters.⁵⁷

A Milwaukee newspaper brought a *mandamus* action seeking the disclosure of the names of applicants for the positions of athletic director and football coach at the University of Wisconsin. The University argued that it was forbidden to disclose this information by a provision of the open records law which stated that "names of applicants other than those certified for employment" should be closed to the public. The appellate court found that this section was not applicable to unclassified positions such as the ones in question here. Therefore, this information must be disclosed.⁵⁸

First Amendment

A family planning group challenged the rejection of its ads for publication in high school athletic event programs, newspapers, and the yearbook. The Ninth Circuit Court of Appeals affirmed judgment for the school district on the basis that all three publications were nonpublic fora and the ads were reasonably rejected on the grounds that they would be controversial and would detract from the educational mission of the high school.⁵⁹ Upon rehearing the Ninth Circuit affirmed *en banc*.⁶⁰

56. *Dooley v. Davidson*, 397 S.E.2d 922 (Ga. 1990).

57. *Cremms v. Atlanta Journal*, 405 S.E.2d 675 (Ga. 1991).

58. *Milwaukee Journal v. Board of Regents of Univ. of Wis. Sys.*, 472 N.W.2d 607 (Wis. Ct. App. 1991).

59. See *THE YEARBOOK OF EDUCATION LAW* 1991 at 167, *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 887 F.2d 935 (9th Cir. 1989).

60. *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (*en banc*).

Criminal Law

In New Jersey, a person was convicted of the crime of possessing cocaine and marijuana with the intent to distribute "while within 1,000 feet of school property." The defendant argued that school owned fields located in a park which was used for athletics, but which was not used for any school purpose at the time of the alleged offense, was not "school property used for school purposes." The court affirmed the conviction on the basis that the designation of school purposes under this criminal statute did not require the actual presence of children on the property at the time of the offense.⁶¹

A defendant who was a former associate athletic director at a state university was convicted of making or permitting a false public voucher. The voucher in question was falsified with the knowledge of the athletic director and the money was taken out of the athletic director's discretionary account. The appellate court affirmed the conviction on the basis that the discretionary account was "public money" for the purposes of the criminal statute in question.⁶²

In a case dealing with sport agents, the defendant Walters was convicted of mail fraud. Walters had induced a number of collegiate players to sign agreements with him providing that he was to act as their agent. However, a number of these agreements were contrary to NCAA rules which prohibit a player with remaining eligibility to sign with an agent. The loss of the player's eligibility ensues if this violation is discovered. The appellate court reversed and remanded for a new trial. The defendant moved to dismiss the indictment on the basis that the mail fraud statute was not applicable to his actions. However, the federal district court held that the right to control the allocation of athletic scholarships was a right protected by the mail fraud statute. The actions taken by the defendant deprived colleges of the right to allocate scholarships on the basis of truthful representations regarding eligibility.⁶³

61. *State v. Ivory*, 592 A.2d 205 (N.J. 1991).

62. *State v. Hearne*, 813 P.2d 485 (N.M. Ct. App. 1991).

63. *United States v. Walters*, 775 F. Supp. 1173 (N.D. Ill. 1991).

7

FINANCE

Betty MacPhail-Wilcox and Patricia Anthony

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Introduction

One federal appellate decision and one district court decision were handed down in the area of school finance in 1991. Both cases involved appropriate use of public funds for religious schools.

Two state supreme courts ruled on the constitutionality of a proposed and current state school financing program. Another state supreme court settled a dispute concerning the disbursement of state funds allocated through an "Excellence in Teaching" program, while a state court of appeal rendered a decision regarding reimbursement to districts for costs engendered while complying with state safety mandates.

Two decisions, one a state supreme court and the other a court of appeal, dealt with school fees assessed against builders. State courts heard two tuition cases, one at the appellate level and the other at the supreme court level.

In the area of tax assessment and collection, four cases were resolved. One supreme court and two lower court decisions on tax assessment were handed down, and one lower court ruling on tax collection was rendered.

Two court of appeal decisions were given on the issue of tax revenue disbursement. The use of school tax base revenues resulted in two decisions, both at the state supreme court level. In the area of tax exemptions, a state supreme court decision was handed down. Bond issuance was the subject of another state supreme court decision. Finally, a state court of appeals settled a dispute over delinquent property tax revenue.

Public Funds for Private Schools

In San Francisco, school district officials were sued by taxpayers over the use of vans or mobile classrooms to provide chapter 1 services to students who attended religious schools.¹ In most cases, the vans were parked on public or private property adjacent to the sectarian school property. In four instances, however, due to safety reasons, the vans were parked on the religious school's property. Plaintiffs contended that the close proximity of the vans to the sectarian school—whether on or off the property—had the effect of promoting a "symbolic union" between church and state.² Plaintiffs cited *School District of Grand Rapids v. Ball* in which the Court had found that "[t]he symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public."³ Plaintiffs pointed out that chapter 1 teachers not only taught in vans near or on sectarian school property, but also used the sectarian school's lunchroom and faculty lounge, attended faculty meetings, and, on occasion, even visited chapter 1 students in their classrooms.

The court ruled that the use of vans adjacent to but not on sectarian school property did not have the primary effect of aiding religion, and therefore was not unconstitutional. However, the use of vans on sectarian school property did create a symbolic union between church and state. The court cited the lower court decision in *Pulido v. Cavazos* to describe the dangers of this practice: "[w]hile the risk of people perceiving a link between the private schools and the mobile units may be less than when services were provided inside the parochial schools themselves, students receiving [chapter 1] services are still receiving those services on private school grounds."⁴

On a third question regarding the school district's practice of taking the cost of the vans "off the top" of the school district's chapter 1 budget, the court ruled that it was constitutional to do so. Noting that chapter 1 regulations require that services, rather than expenditures per child, be comparable, the court decided that the plaintiffs' contention that parochial school students received a larger portion of the district's chapter 1 monies

1. *Walker v. San Francisco Unified Sch. Dist.*, 761 F. Supp. 1463 (N.D. Cal. 1991).

2. *Id.* at 1467.

3. 473 U.S. 373, 397 (1984).

4. 728 F. Supp. 574, 591 (W.D. Mo. 1989).

than did public school students, was not relevant. In fact, the court observed, if the cost of the vans was deducted only from the parochial school students' budget, the end result would be a substantial decrease in educational services for those students. Such a practice, according to the court, would be a direct violation of chapter 1 regulations.

Finally, the court dismissed two final arguments by plaintiffs that specific provisions of chapter 1 give sectarian schools "veto power," and "have led to political divisiveness along religious lines and have created excessive entanglements between church and state."⁵ The court observed that in a previous decision, the Supreme Court found that the Act "does not give the private school a veto power over the program selected by the local agency"⁶ and stated that it could "think of no way in which chapter 1 could be implemented without extensive coordination between the public and parochial school officials." As a result, the court granted the defendants' motions for summary judgment with respect to both claims by plaintiffs.⁷

In May 1991, the Eighth Circuit Court of Appeals reversed a lower court ruling that the use of vans to provide chapter 1 services to religious school students was unconstitutional when the vans were located on the religious school's property.⁸ The appellate court held that when chapter 1 or remedial services are provided in mobile or portable classrooms that do not contain or exhibit religious symbols, then these sites are "religiously neutral" and should not be considered as "annexes" of the sectarian school.⁹ The court affirmed the lower court's ruling that the use of vans off sectarian school property was constitutional, as was the method of payment for the vans (i.e., the bypass method or paying off the top of the entire chapter 1 budget).

Sources and Allocations of Public School Funds

State School Finance Programs

In Texas and Oregon, decisions considering the constitutionality of proposed and established state school financing plans were rendered. The Texas Supreme Court ruled on several aspects of a new financing plan developed in response to an earlier court decision.¹⁰ First, the court reinstated an injunction it had previously set in place, enjoining the commissioner of education and the state comptroller from utilizing the then current Texas School Financing System to distribute funds to school districts. The district court had vacated the injunction in deference to the legislature and in

5. *Walker v. San Francisco Unified Sch. Dist.*, 761 F. Supp. 1463 (N.D. Cal. 1991).

6. *Wheeler v. Barrera*, 417 U.S. 402, 424 (1973).

7. *Walker v. San Francisco Unified Sch. Dist.*, 761 F. Supp. 1463, 1974 (N.D. Cal. 1991).

8. *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991).

9. *Id.* at 919-920.

10. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

order to avoid disrupting public education.¹¹ While the supreme court acknowledged that these were valid concerns, it contended that these concerns were present for the duration of the case and that the decision to lift the injunction for policy reasons belonged to the supreme court alone, not to the lower courts.

The court then addressed the constitutionality of Senate Bill 1. While allowing that the new school finance legislation was an improvement over the previous financing system, the court pointed out that "it leaves essentially intact the same funding system with the same deficiencies we reviewed in *Edgewood I*."¹² Outlining the weaknesses of Senate Bill 1 (i.e., no change in district boundaries, no change in basic funding patterns, and no equalization of access to school funds), the court found Senate Bill 1 unconstitutional.

Third, a motion from the plaintiffs for a rehearing to modify or overrule an earlier decision having implications for current efforts to implement statewide recapture of local property tax revenues, was denied. The court cited constitutional language to provide evidence of a clear delineation between state and local taxes, and stated that "these constitutional provisions mandate that local tax revenue is not subject to statewide recapture."¹³

In Oregon, fifty-five school districts, individual taxpayers, parents of school-aged children, and the children themselves sued the state declaring that the state method for funding public education was unconstitutional.¹⁴ Plaintiffs contended that the state's allowance of public school funding to be dependent upon local property tax levies, was a violation of the state constitutions mandate for the establishment of a uniform and general system of common schools, since it created substantial per-pupil expenditure disparities among districts due to disparate tax bases.¹⁵ Plaintiffs also contended that the state must support what it requires, and that newly enacted programs (e.g., drug and AIDS education, graduation requirements, and minimum pay rates for substitute teachers) were too expensive for some districts to afford.

The court maintained that the plaintiffs' claim had no merit according to a 1976 constitutional amendment. That amendment mandated first that state standards must be met through the use of local property taxes, and second that any additional tax levies must be approved by a majority of the voters of a locality. In response to another challenge brought by plaintiffs that the funding system violated the state's equal protection clause, the court again maintained that the 1976 amendment "contemplates and permits district-to-district differences in what taxpayers pay and what school children receive in per-pupil spending."¹⁶

11. *Id.* at 494.

12. *Id.* at 495.

13. *Id.* at 499.

14. *Coalition for Equitable Sch. Funding, Inc. v. State*, 811 P.2d 116 (Or. 1991).

15. *Id.* at 117.

16. *Id.* at 121.

In another case involving a dispute between two bargaining units over the allocation of state funds distributed through the Excellence in Teaching program, the Supreme Court of New York affirmed a lower court decision that bargaining units other than just the local teachers' union must share equally in funding received through the Excellence in Teaching program.¹⁷ Denying the teachers' union assertion that teaching assistants were only entitled to a portion of the funds, the court observed that "[i]f the new eligibles were entitled only to a share of the amount of the increase, there would be continued discrimination between those teachers eligible thereafter" and that "the purpose of the revision was to eliminate the discrimination, not to perpetuate it."¹⁸

A California court of appeal reversed a lower court's ruling that the state board reimburse a school district for costs incurred while complying with a state statute.¹⁹ Observing that the expenditures occurred prior to the enactment of a constitutional amendment requiring the state to fund new mandated programs, the court ruled that the district's claim for reimbursement had no standing.

School Fees

A California school district imposed a school fee on developers of an apartment complex prior to the issuance of certification necessary for obtaining a building permit. The developers sought a refund, arguing that the school district lacked authority to adopt and impose the fee. Judgment was entered for the school district. On appeal, the decision was affirmed.²⁰

St. Johns County in Florida conducted a study of the infrastructure necessary to support new growth and development which concluded with the enactment of an educational facilities impact fee. The ordinance provided that no new building permits would be issued without payment of an impact fee which would be held in trust for the school board.²¹ A builders association sought a declaratory judgment that the ordinance was unconstitutional, which the trial court entered. The association argued that the ordinance violated the constitutional mandate for a uniform system of free public schools. This decision was affirmed on appeal. On review, the Supreme Court of Florida held that the ordinance did not violate the state constitution, but that no impact fee could be collected under the ordinance until substantially all of the county population was subject to it.

17. *Civil Serv. Employees Ass'n, Local 1000 v. Perillo*, 568 N.Y.S.2d 985 (App. Div. 1991).

18. *Id.* at 986.

19. *Los Angeles Unified Sch. Dist. v. State*, 280 Cal. Rptr. 237 (Ct. App. 1991).

20. *Lincoln Property Co. N.C., Inc. v. Cucamonga Sch. Dist.*, 280 Cal. Rptr. 68 (Ct. App. 1991).

21. *St. Johns County v. Northeast Fla. Builders Ass'n*, 583 So. 2d 635 (Fla. 1991).

School Tax Issues

There were fewer school tax cases this year than in the past year. Several resulted in state supreme court decisions, but most were resolved at lower court levels.

Tuition

When a New York school district sought reimbursement for tuition funds expended on a disabled student from another school district, the case was dismissed.²² On appeal, the court affirmed, holding that the suit was commenced after expiration of the one-year period of limitation.

In New Jersey, a parent withdrew his child from a private school after paying part of the tuition for a year. The parent had signed a contract for annual tuition and selected fees and waived participation in a program which would pay the tuition if the child withdrew. When the parent withdrew the student, a portion of the tuition and a late charge were due.²³ The private school entered suit to collect the balance due. The school's complaint was dismissed and the parent was awarded damages. On appeal, the decision was reversed because the parent had contracted to pay tuition the entire year notwithstanding the withdrawal of the child.

Tax Assessment and Collection

During this reporting period, four cases concerned tax assessment and only one concerned tax collection. Apollo-Ridge School District, a taxing district, appealed an order for declaratory judgment for the Indiana County and Armstrong County Tax Claim Bureaus.²⁴ The judgment held that the Bureaus were entitled to commissions and costs associated with delinquent taxes paid directly to the school tax district even though it was the tax district's actions that led to the collection of the delinquent taxes. An earlier change in tax law provided that taxing districts would be liable to the Bureaus for all charges, fees, costs, commissions, and interest to which it would have been entitled if the payment had been made directly to the Bureaus. The decision was affirmed.

Riverview Gardens School District possesses the power to levy *ad valorem* taxes against property in the district. The district and several taxpayers whose children attended district schools claimed that part of the tax statute violated the Missouri Constitution and the equal protection clause of the Fourteenth Amendment.²⁵

22. Board of Educ. of Katonah-Lewisboro Sch. Dist. v. Board of Educ. of Carmel Cent. Sch. Dist., 571 N.Y.S.2d 333 (App. Div. 1991).

23. Princeton Montessori Soc'y, Inc. v. Leff, 591 A.2d 685 (N.J. Super. Ct. App. Div. 1991).

24. Apollo-Ridge Sch. Dist. v. Tax Claim Bureau of Ind., 595 A.2d 217 (Pa. Commw. Ct. 1991).

25. School Dist. of Riverview Gardens v. St. Louis County, 816 S.W.2d 219 (Mo. 1991) (*en banc*).

Relevant statute provided that political subdivisions may revise tax levies following implementation of an assessment and equalization plan to produce the same tax revenue as was produced in the previous year. It further provided that certain geographically and politically situated districts may adjust the levy to account for inflation without voter approval if the consumer price index does not exceed 5%. A political subdivision within St. Louis County and the City of St. Louis is allowed to adjust its levy for inflation if the consumer price index has not risen more than 5% and the voters have previously granted the governing body the authority to increase the levy by majority vote. In the absence of these stipulations, the levy may not be adjusted to account for inflation and must maintain the same gross tax revenue from year to year.

In 1987-88 and in 1989, the District was required to reduce its levy in the face of an increase in general price levels. The District held that the loss of revenue resulting from the differential treatment by statute was unconstitutional. The trial court upheld the constitutionality of the statutes. On appeal, the Supreme Court of Missouri held the statute unconstitutional and remanded the case.

An Ohio case demonstrated that the possibility of a tax levy is a factor to be considered in a proposed transfer of territory from one school district to another.²⁶ In this case, seventeen questions and nine other factors that should be considered under Ohio Administrative Code were reviewed. Among these was the effect of the transfer on fiscal resources and changes in the distribution of minority students.

A taxpayer sought to enjoin the Wallingford Swarthmore School District in Pennsylvania from levying school taxes on them for the 1990-91 school year.²⁷ The taxpayer argued that the School Board violated a portion of the Public School Code by including fringe benefits for teachers and the supervisory staff in the tax levy, thereby exceeding the twenty-five mill limitation of the Code. The lower court granted the taxpayer's motion and denied the school board's petition to open judgment. On appeal, the decision was reversed as the court held that the legislature intended fringe benefits to be an integral part of salary computations.

Tax Disbursement

Rocky River School District in Ohio sought to recover tax revenues which were allocated to Fairview Park School District.²⁸ An apparent mistake by an auditor caused funds from certain commercial establishments that mistakenly listed themselves on their annual returns in the Fairview

26. *Garfield Heights City Sch. Dist. v. State Bd. of Educ.*, 575 N.E.2d 503 (Ohio Ct. App. 1990).

27. *Slick v. Bowie*, 596 A.2d 282 (Pa. Commw. Ct. 1991).

28. *Board of Educ. of Rocky River City Sch. Dist. v. Board of Educ. of Fairview Park City Sch. Dist.*, 579 N.E.2d 217 (Ohio Ct. App. 1989).

District for several years. Rocky River sought the return of the improperly received tax revenues, and Fairview refused. The lower court entered judgment for Rocky River District and Fairview appealed. The decision was affirmed and the court stated that Fairview had not detrimentally changed its position to preclude recovery of the money paid under a mistake of fact.

Suffolk County School Districts in New York brought actions to obtain interest from funds that had not been disbursed in a timely manner by the towns in which they were located.²⁹ The districts claimed that the towns' disbursements did not comply with the time requirements of the Suffolk County Tax Act, and that they suffered losses of accumulated interest. The towns sought to dismiss the motion. After several appeals and reverses, the state court of appeals held that the districts may maintain such a cause of action.

Use of School Tax Base Revenues

School districts in North Dakota have implied authority to transfer money from the district's general fund to its building fund under statutory provisions. Taxpayers sought to have the district replace funds transferred from the general fund to the building fund. However, the court held that the petitioners had no right to a *writ of mandamus*, as the district had authority to execute the transfer.³⁰

In North Carolina, the State Board of Education sought to prevent local school boards from entering a contract with the developer of a twelve minute current affairs program in which all necessary video equipment to show the program was given to the contracting school systems for use during the duration of the contract. Broadcasts were made at 6:00 a.m., taped, and previewed for appropriateness by school staff members or committees. Appropriate programs were to be shown in entirety at the same time each school day and on at least 95% of the school days. Students not wishing to view them were allowed to do something else during this time.

The State Board of Education adopted a temporary rule prohibiting local school boards from entering into certain contracts. In brief, this rule prohibited contracts which limit or impair the authority of local administrators and teachers to determine materials to be presented during the school day or the times when materials will be presented to students. It also provided that local boards must assure that students are not made a captive audience. The Administrative Rules Review Commission informed the State Board of Education that it objected to the temporary rule on several grounds. In a letter, the Commission asserted that the Board lacked authority to use the

29. Board of Educ. of Cold Spring Harbor Cent. Sch. Dist. v. Rettaliata, 572 N.Y.S.2d 885 (App. Div. 1991).

30. Peterson v. McKenzie County Pub. Sch. Dist. No. 1, 467 N.W.2d 456 (N.D. 1991).

temporary rule making procedure since the execution of commercial contracts did not pose either a serious or unforeseeable threat to public welfare.

Prior to the commission's letter, the Davidson County Board of Education signed a contract for these services. The Superintendent of Public Instruction and the State Board of Education of North Carolina asked the court to declare the contract void and unenforceable.³¹ They also obtained a temporary restraining order. Counterclaims were filed requesting the court to find the contract valid and enforceable, to hold the temporary rule be declared unlawful, unconstitutional, and in violation of the State Board's own rules, and to enjoin permanently the State Board from enforcing the rule.

The Board's complaint was dismissed and appeal was taken. The Supreme Court of North Carolina affirmed the position, stating that the contract did not violate the state constitution, which provides that tax dollars be spent only for public purposes. The court held also that the State Board did not have authority to promulgate the temporary rule.

Tax Exemptions

When a charitable school, incorporated as a Missouri charitable corporation in 1907, sought relief from St. Louis business license taxes, a circuit court entered judgment for the school and awarded attorney fees.³² On appeal, the Supreme Court of Missouri held that the charitable school was a "person" as prescribed by statutes. The court stated that the school's only function had been to teach young people in manual and mechanical trades. Because the statute exempted persons pursuing a livelihood in teaching, it was exempt from the city license tax. However, the court held that the trial court should not have awarded attorney fees.

Bond Issuance

Palm Beach County attempted to issue industrial revenue bonds for capital projects at a private school that was organized as a not-for-profit corporation. The state of Florida appealed the lower court's validation of the bonds arguing that the school was unlawfully organized as a not-for-profit school.³³ The state argued that the project did not constitute a valid public purpose as required by law. The Supreme Court of Florida held that the school was a private corporation and thus the county could not engage in its financing.

31. *State v. Whittle Communications*, 402 S.E.2d 556 (N.C. 1991).

32. *David Ranken, Jr. Technical Inst. v. Boykins*, 816 S.W.2d 189 (Mo. 1991).

33. *State v. Palm Beach County*, 575 So. 2d 652 (Fla. 1991).

Delinquent Property Taxes

Aldine Independent School District in Texas sought to recover delinquent property taxes based on a certified copy of delinquent tax rolls.³⁴ The taxpayers claimed that the tax bill was mailed after the prescribed statutory date and that they should be excused from the payment of penalty and interest. Summary judgement favoring the district was entered and on appeal affirmed.

34. *Amoroso v. Aldine Indep. Sch. Dist.*, 808 S.W.2d 118 (Tex. Ct. App. 1991).

8

HIGHER EDUCATION

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Introduction

In 1991, there was a significant increase in the number of cases litigated. Areas of particular increase involved sunshine laws, financial aid, and estates and wills. Issues continue to be litigated around the question of authority over higher education by various governmental agencies. The relationships of students, faculty, and alumni to both private and public institutions were litigated on questions of constitutional rights and tort liability. Business-university relationships were reflected in the antitrust and copyright litigation.

Intergovernmental Relations

This section presents the issues surrounding the regulation of institutions of higher education and the interrelationship of various governmental agencies with institutions. The authority of the United States Congress was brought under scrutiny through a controversy over a human rights statute passed by the District of Columbia.¹ In an earlier case,² a local court found that a Catholic university's refusal to recognize a homosexual and lesbian group violated the District of Columbia Human Rights Act. In response, Congress passed an appropriations bill in which the receipt of money hinged on the District of Columbia's repeal of the antidiscrimination provisions concerning homosexuals. The federal district court found that the bill infringed on the First Amendment rights of District council members by forcing them to speak against their will.³ On appeal for rehearing the federal circuit court found the issues moot since the 1989 appropriations bill had expired and moneys appropriated to the District had been paid without repeal of the human rights provisions.⁴

Legislative Authority

A Nebraska court found that state law prohibited a state senator from maintaining employment as an employee of the executive branch of state government while serving in the legislature.⁵ The legislator was also on a leave of absence from a tenured faculty position at a public state college. The Colorado legislature passed a law authorizing the reorganization of the university hospital as a private entity.⁶ At issue was whether the hospital employees still should be classified as public employees. The court found that the regents had authority to form private entities; however, the effect of the law was to establish a public entity to which state personnel policies would be applied. Finally, a lesbian state employee avoided a defendant's dismissal motion in a challenge to a referendum which stated that personnel actions cannot be influenced by the sexual orientation of the employee.⁷

1. *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990).

2. See THE YEARBOOK OF EDUCATION LAW 1989 at 231, *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. Cir. 1987).

3. See THE YEARBOOK OF EDUCATION LAW 1991 at 191, *Clarke v. United States*, 705 F. Supp. 605 (D.D.C. 1989), *aff'd*, 886 F. Supp. 404 (D.C. Cir. 1989).

4. *Clarke v. United States*, 915 F.2d 699 (D.C. Cir. 1990).

5. *State ex rel. Spire v. Conway*, 472 N.W.2d 403 (Neb. 1991).

6. *Colorado Ass'n of Pub. Employees v. Board of Regents, Univ. of Colo.*, 804 P.2d 138 (Colo. 1990) (*en banc*).

7. *Merrick v. Board of Higher Educ.*, 797 P.2d 388 (Or. Ct. App. 1990).

Agency or Board Authority

An animal protection group challenged the use of primates in research and, based on state animal cruelty statutes, attempted to get custody of the primates.⁸ The National Institute of Health was successful in its attempt to have the case moved to federal court. On appeal the Fifth Circuit Court of Appeals found that the group lacked standing to protect the alleged rights of animals and affirmed the federal agency's statutory authority to move the case to a federal court.⁹ However, the Supreme Court ruled that the case was erroneously removed from state court and should be remanded for adjudication at that level.¹⁰ Other litigation concerning animal rights is covered under sunshine laws in this section of the chapter.

A Missouri group sought a court order requiring the State Coordinating Board for Higher Education to review a petition to establish a community college district as required by state law.¹¹ The board had frozen all petitions until appropriate criteria were developed to evaluate them. An Iowa court found that a community college had not violated a statute prohibiting state competition with a private entity when it established an asbestos training course similar to one offered by a proprietary school.¹²

A state education department's right to review advertising of proprietary schools was challenged in court.¹³ As per agreements made in an out of court settlement, the Department of Education had the advertising portion of the statute changed. The association of proprietary schools, in this litigation, unsuccessfully sought the award of attorney fees claiming to be the prevailing party. In another New York controversy between state agencies, the Commissioner of Health was successful in annulling a State Department of Education order that he release to the physician a malpractice investigation report required by law to be held confidential.¹⁴ A Wisconsin unincorporated student group, established to operate the student union, was a state agency requiring the approval of the State Attorney General before an attorney could be employed in a suit against the university.¹⁵

Licensing and Accreditation. In Florida, the State Department of Education failed to follow appropriate administrative procedures when it

8. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700 (1991).

9. *International Primate Protection League v. Administrators of Tulane Univ.*, 908 F.2d 1338 (5th Cir. 1990).

10. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1710 (1991).

11. *State ex rel. Lake of the Ozarks Community College Steering Comm., Inc. v. Coordinating Bd. for Higher Educ.*, 802 S.W.2d 533 (Mo. Ct. App. 1991).

12. *American Asbestos Training Center, Ltd. v. Eastern Iowa Community College*, 463 N.W.2d 56 (Iowa 1990).

13. *New York State Ass'n of Career Schs. v. State Educ. Dep't of N.Y.*, 749 F. Supp. 1264 (S.D.N.Y. 1990).

14. *In re Axelrod*, 571 N.Y.S.2d 902 (App. Div. 1991).

15. *Kaye v. Board of Regents of Univ. of Wis. Sys.*, 463 N.W.2d 398 (Wis. Ct. App. 1990).

issued a cease-and-desist order against a state licensed proprietary school.¹⁶ A Texas agency and a private accrediting agency refused to allow the automatic transfer of licenses and accreditation of a proprietary school in the sale of the school during bankruptcy proceedings.¹⁷ The court found no bankruptcy law was violated when the agency and private association required the purchaser to follow the normal requirements to acquire the license or certification of the school's programs.

A graduate school sued the superintendent of public instruction after he denied the school a license for a teacher preparation program based on creationism.¹⁸ On a motion to dismiss the federal district court ruled that the declaratory injunction was not moot, and the graduate students and the institution had standing to litigate but the elementary school, which hired their graduates, did not.

Sunshine Laws. Access by newspapers and other groups to official documents and files of institutions of higher education continued to be litigated under state and federal laws. Under the federal Freedom of Information Act,¹⁹ an author and researcher sought access to Federal Bureau of Investigation files kept on various groups at the University of California at Berkeley during the Free Speech Movement and war protest period of the 1960's and 1970's.²⁰ The court found that initial investigations of the Free Speech Movement were for legitimate law enforcement purposes exempt from disclosure. However, materials gathered after January 1965 were the result of routine monitoring and were subject to public disclosure.

A Wisconsin newspaper sued a university to force disclosure of the names of applicants to coaching and athletic director positions. The court found that, absent clear direction in the law, applicants for high level government or university positions cannot be shielded from public access. Their names, as well as related records, were ordered opened.²¹ However, the Arizona Board of Regents was authorized, under the state's sunshine law, to withhold the names and resumes of all applicants except those on the final list of candidates for the Arizona State University presidency.²² An Iowa court held that an administrative panel organized to review promotion decisions was not a "governmental body" subject to the state's open meeting laws.²³

The plaintiff in a Colorado case was dismissed from his position as chancellor of a private university following a dispute with the university

16. *Allied Educ. Corp. v. State Dep't of Educ.*, 573 So. 2d 959 (Fla. Dist. Ct. App. 1991).

17. *In re Draughton Training Inst., Inc.*, 119 B.R. 927 (Bankr. W.D. La. 1990).

18. *ICR Graduate Sch. v. Honig*, 758 F. Supp. 1350 (S.D. Cal. 1991).

19. 504 U.S.C. § 552 *et seq.*

20. *Rosenfeld v. United States Dep't of Justice*, 761 F. Supp. 1440 (N.D. Cal. 1991).

21. *Milwaukee Journal v. Board of Regents of Univ. of Wis. Sys.*, 472 N.W. 2d 607 (Wis. Ct. App. 1991).

22. *Arizona Bd. of Regents v. Phoenix Newspapers, Inc.*, 806 P.2d 348 (Ariz. 1991).

23. *Donahue v. State*, 474 N.W. 2d 537 (Iowa 1991).

president. The parties brought the dispute to arbitration and the resulting settlement agreement was placed in the former employee's personnel file. A Colorado newspaper sought access to the agreement. The state court ruled that placing the settlement agreement in the personnel file did not shield it from the Colorado Public Documents Law because, like employment contracts, the agreement was not considered a confidential employee matter.²⁴ A Wisconsin newspaper sought access to the final report of an in-house committee which investigated and rejected nepotism and other charges brought against a faculty member.²⁵ The court found that disclosure requirements under the sunshine law outweighed any damage disclosure might have caused to the professor's reputation. Two Georgia cases involved money received by coaches for tasks performed which were related to their coaching positions.²⁶ The court found that moneys received for tasks such as interviews and television appearances were moneys received in the course of public employment and subject to the open records laws. However, moneys received for speaking appearances as a manufacturer's representative were not matters of public record.²⁷

A Connecticut court refused to disclose to the campus newspaper all the names of student employees of a university public safety office, finding that the law provided for disclosure of students' names only upon their consent.²⁸ In Missouri, a newspaper sued for access to campus police incident reports under the state sunshine laws.²⁹ The court granted access to the records, which were regularly shared with other public police authorities. Furthermore, since these were not educational records, the Family Education Rights and Privacy Act did not prohibit their release.

A South Carolina fundraising foundation affiliated with a public university must open its financial records to the public because the private foundation received public money.³⁰ A Georgia court ruled that a state court did not abuse its discretion when it failed to award attorney fees to the prevailing party in an open records case.³¹ The court ruled that the newspaper's action, which gained access to an investigation report on a university vice-president who was co-executor of an estate willed to the university, was of no substantial benefit to the general public necessitating an attorney fee award.³² Finally, a California court ruled that the award of attorney fees to a prevailing party was mandatory under the law finding that

24. *Denver Publishing Co. v. University of Colo.*, 812 P.2d 682 (Colo. Ct. App. 1990).

25. *Wisconsin State Journal v. University of Wis.-Platteville*, 465 N.W.2d 266 (Wis. Ct. App. 1990).

26. *Cremens v. Atlanta Journal*, 405 S.E.2d 675 (Ga. 1991).

27. *Dooley v. Davidson*, 397 S.E.2d 922 (Ga. 1990).

28. *University of Conn. v. Freedom of Info. Comm'n*, 585 A.2d 690 (Conn. 1991).

29. *Bauer v. Kincaid*, 759 F. Supp. 575 (W.D. Mo. 1991).

30. *Weston v. Carolina Research & Dev. Found.*, 401 S.E.2d 161 (S.C. 1991).

31. *Advertisers Co. v. Auburn Univ.*, 579 So. 2d 645 (Ala. Ct. Civ. App. 1991).

32. *Id.* at 648.

the release of information sought by the insurance company resulted from the professor's filing of the suit.³³

Several groups sought access to the evaluations of proposals submitted to university research review committees. Students for the Ethical Treatment of Animals were successful in gaining access to review committee documents.³⁴ The court found that the state's open records law compelled disclosure of the research applications but not the names of the researchers or their staff. Applications did not contain "protected trade secrets"³⁵ nor did disclosure violate First Amendment and academic privilege provisions. However, a New York court would not order the meetings of a university animal use committee opened to the public finding it was not a "public body" as defined in the law.³⁶

Taxation. The National Collegiate Athletic Association (NCAA) challenged a tax court ruling that advertising in the programs of the semi-final and final rounds of NCAA Men's Basketball Tournament was an unrelated business income subject to taxation.³⁷ The Tenth Circuit Court found that the advertising, placed in the tournament program once a year, was not a regular activity nor an unfair competitor with regular publishers subjecting revenues to the unrelated business tax provisions.³⁸

State and local taxation issues were numerous. In Illinois, a college chancellor who successfully fought contempt charges for his use of college funds and property to win support for a tax increase,³⁹ eventually sued the law firm which represented him in the contempt charge. The appellate court found that the chancellor stated a cause of action and substantiated damages requiring reversal and remand of the lower court's denial of the damage award.⁴⁰ A New Jersey private institute successfully defended its tax exempt status as a nonprofit educational corporation after it leased property to a private noneducational corporation.⁴¹ An Illinois proprietary school lost its bid to receive a real estate tax exemption as a school.⁴² In another Illinois case, the court found that neither the educational nor charitable exemptions from taxation where met by an alumni association organized to perform fundraising and student recruitment activities for an out-of-state private

33. *Beth v. Gillespie*, 283 Cal. Rptr. 829 (Ct. App. 1991).

34. *S.E.T.A. UNC-CH, Inc. v. Huffines*, 399 S.E.2d 340 (N.C. Ct. App. 1991).

35. *Id.* at 342.

36. *ASPCA v. Board of Trustees of State Univ. of N.Y.*, 568 N.Y.S.2d 631 (App. Div. 1991).

37. *National Collegiate Athletic Ass'n v. Commissioner of Internal Revenue*, 914 F.2d 1417 (10th Cir. 1990).

38. *Id.* at 1425.

39. See *THE YEARBOOK OF EDUCATION LAW 1989* at 199, *Jenner v. Wissore*, 517 N.E.2d 1220 (Ill. App. Ct. 1988).

40. *Wissore v. Alvey*, 562 N.E.2d 978 (Ill. App. Ct. 1990).

41. *City of Hoboken v. Trustees of Stevens Inst.*, 11 N.J. Tax 70 (Tax Ct. N.J. 1990), *aff'd*, *City of Hoboken v. Trustees of Stevens Inst.*, 588 A.2d 1262 (N.J. Super. Ct. App. Div. 1991).

42. *Winona Sch. of Professional Photography v. Department of Revenue*, 570 N.E.2d 523 (Ill. App. Ct. 1991).

university.⁴³ An Arkansas court found that a city and a university joint construction of an art center, not reserved strictly for public use, was not exempt from *ad valorem* taxes during construction.⁴⁴

Zoning. The decisions of zoning boards were challenged in the courts. A California court found that nonclassroom facilities (i.e., parking lots) were not exempt from city zoning laws which prohibited sales activities on the parking lot.⁴⁵ The Rhode Island Supreme Court found that the denial of an exemption to the zoning laws in order to convert a carriage house adjacent to a dormitory into a student dormitory was an abuse of discretion.⁴⁶ Neighbor's testimony on traffic problems was not the testimony of traffic experts and could not serve as the basis for the denial. In Pennsylvania, a zoning board denial involving the use of a private residence as a dormitory was remanded on appeal.⁴⁷ The lower court exceeded its authority when it modified the college plan and approved a plan the college had not submitted. A zoning board was found not to have abused its discretion when it granted a university a variance on the height of a structure in order to preserve more land for a first growth forest preserve.⁴⁸

Eminent Domain. In Missouri, condemnation procedures were successful in the university's acquisition of a parking lot adjacent to a private trust's residence which housed students enrolled in the university's degree programs.⁴⁹ Owners of property in Alabama sought remedies after a public university began and then ceased condemnation proceedings in an attempt to build a basketball complex. The president and the trustees could not be ordered to produce records of their personal land holdings within a one mile radius of the campus until the pertinence of each of those records to the issues at hand could be established.⁵⁰

Environmental Impact. A Massachusetts case involved attempts by a local group to have anthrax research declared dangerous to public health. The court found that the State Department of Environmental Protection could not intercede in this matter until the local health board completed its review by approving the site of the research.⁵¹ A chemical company, which was held liable for the cleanup of a hazardous waste site, could recover costs from a third party, a university which also used the site.⁵²

Jurisdiction. A Pennsylvania court suppressed evidence obtained during a campus police officer's arrest of a suspect off campus and out of the

43. *Yale Club of Chicago v. Department of Revenue*, 574 N.E.2d 31 (Ill. App. Ct. 1991).

44. *City of Fayetteville v. Phillips*, 811 S.W.2d 308 (Ark. 1991).

45. *People ex rel. Cooper v. Rancho Santiago College*, 277 Cal. Rptr. 69 (Ct. App. 1990).

46. *Salve Regina College v. Zoning Bd. of Review of Newport*, 594 A.2d 878 (R.I. 1991).

47. *Lafayette College v. Zoning Hearing Bd. of Easton*, 588 A.2d 1323 (Pa. Commw. Ct. 1991).

48. *Emory Univ. v. Levitas*, 401 S.E.2d 691 (Ga. 1991).

49. *Curators of Univ. of Mo. v. Brown*, 809 S.W.2d 64 (Mo. Ct. App. 1991).

50. *Ex parte Alabama State Univ.*, 571 So. 2d 301 (Ala. 1990).

51. *American Friends Serv. Comm'n of W. Mass. v. Commissioner of Dep't of Envtl. Protection*, 569 N.E.2d 833 (Mass. App. Ct. 1991).

52. *United States v. Alcan Aluminum Corp.*, 755 F. Supp. 531 (N.D.N.Y. 1991).

officer's jurisdiction. The officer, while at the campus boundaries, observed a driver run a city red light, pursued the driver within the city, found the vehicle abandoned, and arrested an inebriated individual hiding in some bushes in the residential area.⁵³

Sovereign Immunity. In Illinois, university officials were immune from prosecution in federal court under the Eleventh Amendment.⁵⁴ At issue was a suit for damages arising out of injuries received by a graduate student when a laboratory experiment exploded. In another case, a federal district court ruled that attending physicians were public employees, not private contractors, subject to Puerto Rico's immunity from malpractice claims.⁵⁵

Ownership. The question of ownership of a lease of land and the buildings constructed on the land were at issue in a private corporation's chapter 7 bankruptcy. A private post-secondary institution entered into a ninety-year lease of land with the cost of the lease to be paid off in three years. The private corporation built a manufacturing facility upon the leased land. The Second Circuit Court ruled that the prepaid lease was not a *bona fide* lease requiring the chapter 7 trustees to assume or reject it within the bankruptcy law's sixty-day period.⁵⁶ In Indiana, an individual purchasing a proprietary school had the right to view corporate documents in order to assess valuation of stocks already held.⁵⁷

University Hospitals. A number of cases involved ruling by the Secretary of Health and Human Services on reimbursement for services under federal statutes. In Mississippi, the Secretary's decision to deny provider reimbursement was upheld because the state elected to bear the cost of nursing and allied health education programs from which services had been received.⁵⁸ A Georgetown University Hospital case involved a dispute not only on the amount of reimbursement but also on how interest was computed on withheld reimbursements under the law.⁵⁹ The court found that interest was computed on the amount withheld, not the total amount of the payment requested. In a case involving the Pennsylvania Department of Public Service, the court found that its reimbursement plan did not conform to the Medicaid Statute.⁶⁰ Finally, Pennsylvania reimbursement for Medicaid to a West Virginia hospital treating Pennsylvania residents was successfully challenged by the out of state hospital.⁶¹ On the assessment of legal fees to the prevailing party, the Supreme Court ruled that services rendered by

53. *Commonwealth v. Savage*, 589 A.2d 696 (Pa. Super. Ct. 1991).

54. *Henning v. Board of Regents of Regency Univ.*, 928 F.2d 775 (7th Cir. 1991).

55. *Rivera v. Hospital Universitario*, 762 F. Supp. 15 (D.P.R. 1991).

56. *International Trade Admin. v. Rensselaer Polytechnic Inst.*, 936 F.2d 744 (2d Cir. 1991).

57. *Wrights Beauty College, Inc. v. Bostic*, 576 N.E.2d 626 (Ind. Ct. App. 1991).

58. *Board of Trustees of State Inst. of Higher Learning v. Sullivan*, 763 F. Supp. 178 (S.D. Miss. 1991).

59. *Georgetown Univ. Hosp. v. Sullivan*, 934 F.2d 1280 (D.C. Cir. 1991).

60. *Temple Univ. v. White*, 941 F.2d 201 (3d Cir. 1991).

61. *West Virginia Univ. Hosp., Inc. v. Casey*, 701 F. Supp. 496 (M.D. Pa. 1988), *aff'd in part, rev'd in part, vacated in part*, 885 F.2d 11 (3d Cir. 1989).

experts in civil rights cases would only be allowed for their in-court testimony as witnesses in a judicial proceeding as prescribed by the law.⁶²

Criminal Prosecution. In the conviction of an athletic director of a New Mexico public institution, the court found that discretionary funds held by the athletic director were public funds subject to the same rules of expenditure as other public funds.⁶³ On appeal the Eighth Circuit Court of Appeals ruled that imprisonment was not mandatory for possession of cocaine with intent to distribute within 1,000 feet of a university.⁶⁴ A New York court rejected false arrest and imprisonment claims finding sufficient evidence to substantiate the arrest of the suspect on charges of theft of university property.⁶⁵ A law student was successful in getting an incident with his girlfriend, resulting in conviction for assault, expunged from his records under the first offender provisions.⁶⁶ Several other cases involved procedures followed in the arrest and conviction of university affiliated individuals for disorderly conduct,⁶⁷ a violation of the controlled substance act,⁶⁸ theft of property,⁶⁹ marijuana possession,⁷⁰ and a criminal act within a prescribed distance of the campus.⁷¹ Finally, federal courts addressed questions regarding the severity of sentences imposed resulting from a student's guilty plea for possession and distribution of cocaine,⁷² and a graduate student's theft and transportation across state lines of a university's rare book collection.⁷³

Constitutional Issues. Questions involving the constitutional rights of postsecondary institutions of higher education were again before the courts this year. The lead off case involved proprietary schools whose recruiting officers had already been convicted of fraud⁷⁴ and whose recruiting practices resulted in a 70% default rate on student loans.⁷⁵ At issue was whether a state's regulations controlling the pay of recruiters, advertising, and state visitation rights violated Fourteenth Amendment equal protection rights, First Amendment free speech rights, Fourth Amendment search and seizure provisions, and Sherman Antitrust Act free trade provisions. A federal

62. *West Virginia Univ. Hosp., Inc. v. Casey*, 111 S. Ct. 1138 (1991).

63. *State v. Hearne*, 813 P.2d 485 (N.M. Ct. App. 1991).

64. *United States v. Williams*, 942 F.2d 526 (8th Cir. 1991).

65. *Parkin v. Cornell Univ., Inc.*, 562 N.Y.S.2d 1013 (App. Div. 1990), *aff'd*, 569 N.Y.S.2d 610 (N.Y. 1991).

66. *State v. Greene*, 573 N.E.2d 110 (Ohio 1991).

67. *Ross v. State*, 802 S.W.2d 308 (Tex. Ct. App. 1990).

68. *State v. Harber*, 401 S.E.2d 57 (Ga. Ct. App. 1990).

69. *Baker v. State*, 574 So. 2d 1018 (Ala. Crim. App. 1990).

70. *Pridgeon v. State*, 569 N.E.2d 722 (Ind. Ct. App. 1991).

71. *Jones v. State*, 402 S.E.2d 522 (Ga. Ct. App. 1991).

72. *United States v. Riles*, 928 F.2d 339 (10th Cir. 1991).

73. *United States v. Matovsky*, 935 F.2d 719 (5th Cir. 1991).

74. *United States v. Grundhoefer*, 916 F.2d 788 (2d Cir. 1990); see discussion below on student financial aid.

75. *New York State Ass'n of Career Schs. v. State Educ. Dep't of N.Y.*, 749 F. Supp. 1264 (S.D.N.Y. 1990).

district court found no basis for any of these claims in the state's regulatory scheme which applied only to nondegree granting proprietary schools.

Separation of church and state was at issue in a case involving the issuance of city bonds used to construct facilities on the campus of a private church related institution. A Virginia court, citing other private college funding cases,⁷⁶ found that religion so permeated this particular private church related college resulting in the funding scheme's violation of the establishment clause of the First Amendment.⁷⁷

Discrimination in Employment

Enforcement of federal regulations prohibiting discrimination in the operation of all facets of postsecondary institutions are presented in this section. The anticipated removal of mandatory retirement in higher education resulted in an increase in the litigation on age discrimination. Proof strategies and jurisdictional questions continue to be the foci of some of this litigation.

Title VI

Title VI of the Civil Rights Act of 1964⁷⁸ prohibiting discrimination based on race, color, or national origin in programs receiving federal financial assistance, was again before the courts this year. A case involving the Mississippi System of Higher Education was before the Fifth Circuit Court on a rehearing *en banc*.⁷⁹ Originally on a suit charging discrimination in the state's higher education system, the district court ruled that the state had made every effort to "disestablish" its dual system of higher education by developing racially neutral policies and practices.⁸⁰ The Fifth Circuit Court of Appeals reversed and remanded the case finding that the racially neutral policies were not sufficient enough to bring the state system into compliance with title VI because of the continuing imbalance in enrollment and failure to implement policies to address these imbalances.⁸¹ However, on rehearing the circuit court *en banc* found that the district judge was correct in holding that a particular level of racial balance was not required to bring a state system into compliance with title VI but rather the state needed to

76. See *Hunt v. McNair*, 413 U.S. 734 (1973); *Roemer v. Board of Trustees of Pub. Works of Md.*, 426 U.S. 736 (1976); *Tilton v. Richardson*, 403 U.S. 672 (1971).

77. *Habel v. Industrial Dev. Auth. of Lynchburg*, 400 S.E.2d 516 (Va. 1991).

78. 42 U.S.C. § 2000d.

79. *Ayers v. Allain*, 914 F.2d 676 (5th Cir. 1990).

80. See THE YEARBOOK OF EDUCATION LAW 1989 at 205, *Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987).

81. See THE YEARBOOK OF EDUCATION LAW 1991 at 198, *Ayers v. Allain*, 893 F.2d 732 (5th Cir. 1990).

adopt and develop racially neutral policies and procedures.⁸² The appellate court found that the lower court decision accurately documents that Mississippi had adequately met the compliance requirements of title VI. The Supreme Court granted *certiorari*,⁸³ oral arguments have been heard, and an opinion is forthcoming.

The state of Louisiana was also involved in extensive litigation surrounding its dual system of higher education. Contrary to the district court's ruling in Mississippi, the district court in Louisiana found that the state had failed to "disestablish" its dual system of higher education and, after review by a special master, issued a court ordered restructuring of the state's system of higher education.⁸⁴ The current litigation involves objections to the remedial order revisions and the authority of the district court to sit as a three judge panel,⁸⁵ a ruling on the governor's authority to represent the state in this litigation over the authority of the attorney general,⁸⁶ and a ruling to vacate the district court order in light of the Fifth Circuit Court's decision in the Mississippi case as previously reported.⁸⁷

Title VII

Title VII of the Civil Rights Act of 1964⁸⁸ was the basis for a large number of litigations this year. Some of the cases in this area are covered under questions of tenure and denial of benefits to employees. Others are reported here to give the reader an idea of the types of issues involved.

The question of tolling and when the statute of limitations has been reached was before the courts this year. In Pennsylvania, a federal district court denied a defendant's summary judgment motion that the claim was time barred because a female professor was able to show that her sexual harassment was continuous.⁸⁹ The court applied the doctrine of equitable tolling even though the violation commenced more than 180 days prior to the filing of this complaint. In another case, the Ninth Circuit Court of Appeals, reversing a lower court summary judgment, found a continuous violation would not yield a dismissal of this claim as time barred.⁹⁰ However, an Indiana federal court found that a terminated female employee's sex and age discrimination complaints were time barred when approximately two years

82. *Ayers v. Allam*, 914 F.2d 676, 679 (5th Cir. 1990).

83. *United States v. Mahus*, 111 S. Ct. 1579 (1991).

84. See THE YEARBOOK OF EDUCATION LAW 1989 at 204; *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988); see also special masters report and court order, 718 F. Supp. 499 (E.D. La. 1990), 718 F. Supp. 509 (E.D. La. 1990), 718 F. Supp. 525 (E.D. La. 1990).

85. *United States v. Louisiana*, 751 F. Supp. 606 (E.D. La. 1990).

86. *United States v. Louisiana*, 751 F. Supp. 608 (E.D. La. 1990).

87. *United States v. Louisiana*, 751 F. Supp. 621 (E.D. La. 1990).

88. 42 U.S.C.A. § 701 *et seq.*, as amended 42 U.S.C.A. § 2000e *et seq.*

89. *Garvey v. Dickinson College*, 763 F. Supp. 799 (M.D. Pa. 1991).

90. *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990); see THE YEARBOOK OF EDUCATION LAW 1990 at 204; *Sosa v. Hiraoka*, 714 F. Supp. 1100 (E.D. Cal. 1988).

had elapsed between the termination notice and the filing of a claim.⁹¹ In Illinois, when the institution notified the plaintiff that it had denied tenure and rejected her request for reconsideration, the statute of limitations commenced tolling rendering the claim time barred.⁹² An Iowa worker's claim, based on a violation of a previous settlement by giving information to a prospective employee, was time barred.⁹³

Procedural issues in filing title VII claims were also litigated. The Ninth Circuit Court of Appeals reversed a lower court's summary judgment finding material issues to be resolved in a faculty member's disparate treatment claim of gender discrimination in the assignment of teaching and other duties.⁹⁴ A New York federal court found that material issues existed to deny summary judgment in a terminated college employee's discrimination claim that her supervisor was biased against Jamaican women.⁹⁵ In the Pennsylvania sexual harassment case mentioned above, the court denied a motion to suppress evidence.⁹⁶ The court found that evidence regarding a supervisor's harassment of other females was relevant to his attitude, not remote in time, or too attenuated to support the professor's allegations of sexual harassment. In an Alabama case, on remand⁹⁷ to the federal district court, sufficient evidence was presented for a jury to find that the hiring of a younger male was based on nondiscriminatory reasons.⁹⁸ A personnel officer's title VII claim was barred because of "unclean hands."⁹⁹ The personnel officer in a reorganized college could not bring a claim of failure to advertise a position when he successfully lobbied for the hiring of another employee to another position without the position first being advertised. A Tennessee professor was barred by Eleventh Amendment immunity from suing the state but could sustain a suit against individual officers of the institution in a claim of discrimination based both on race and religion in the denial of an administrative appointment.¹⁰⁰

Proof strategies under title VII continue to be litigated. In these cases, the burden of proof shifts from the plaintiff, who must establish a *prima facie* case of discrimination, to the defendant to show valid reasons for the action, and back to the plaintiff to show the reasons were a pretext for discrimination.¹⁰¹ In a case involving the award of a distinguished professorship, a white male was unable to establish a *prima facie* case for reverse discrimi-

91. *Wimberg v. University of Evansville*, 761 F. Supp. 587 (S.D. Ind. 1989).

92. *Faulkner-King v. Board of Trustees of Univ. of Ill.*, 757 F. Supp. 951 (C.D. Ill. 1991).

93. *Winters v. Iowa State Univ.*, 768 F. Supp. 2331 (N.D. Ill. 1991).

94. *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104 (9th Cir. 1991).

95. *Budd v. City Univ. of N.Y.*, 749 F. Supp. 86 (S.D.N.Y. 1990).

96. *Garvey v. Dickinson College*, 761 F. Supp. 1175 (M.D. Pa. 1991).

97. See THE YEARBOOK OF EDUCATION LAW 1991 at 200, *Burns v. Gadsden State Community College*, 908 F.2d 1512 (11th Cir. 1990).

98. *Burns v. Gadsden State Community College*, 766 F. Supp. 1049 (N.D. Ala. 1991).

99. *Woods v. Ficker*, 768 F. Supp. 793 (N.D. Ala. 1991).

100. *Chaudhuri v. Tennessee*, 767 F. Supp. 860 (M.D. Tenn. 1991).

101. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

nation.¹⁰² Also, a former Hispanic employee failed to establish a case of national origin discrimination in the failure of the former employer to rehire him.¹⁰³

Several cases involved questions of whether the plaintiff established that the defendant's reasons were a pretext for discrimination. Citing *Price Waterhouse v. Hopkins*,¹⁰⁴ the federal district court found that the "mixed motive theory" for pretext means that discrimination must be the determining factor in the pretextual employment decision, not just a factor.¹⁰⁵ An unsuccessful California applicant was unable to show that an employer's reason for not hiring (low ratings by interviewers) was a pretext for discrimination based on sex and race.¹⁰⁶ However, an Hispanic associate professor was able to establish a *prima facie* case for discrimination when he was repeatedly denied promotion to full professor. Furthermore, through comparisons with a similarly situated female faculty member, he was able to show that the reason for denial (low ratings on promotion criteria) was a pretext for discrimination because less rigid standards were applied to the female.¹⁰⁷

Several cases involved well-documented and extensive discrimination against a female employee. In Hawaii, a department head's discrimination against a faculty member was extensively documented as was the plaintiff's claim of retaliation after she filed a claim.¹⁰⁸ The case resulted in a large damage award including front-pay, back-pay, interest, and attorney fees. A Michigan public safety officer was able to establish extensively documented gender discrimination and retaliation by her superiors.¹⁰⁹ Her settlement, however, was reduced by 50% because she had falsified application materials. A Hispanic employee was able to show that his race was the reason for his discharge from a position.¹¹⁰

Age Discrimination in Employment

The Age Discrimination in Employment Act (ADEA)¹¹¹ has become a more heavily litigated regulation over the last several years. For example, in a case reported last year, a federal appellate court certified the question of an employer's attempt to have the insurance company indemnify a loss result-

102. *Silver v. City Univ. of N.Y.*, 767 F. Supp. 494 (S.D.N.Y. 1991).

103. *Fuentes v. National Educ. Ass'n*, 752 F. Supp. 487 (D.D.C. 1989).

104. 490 U.S. 228 (1989).

105. *Foster v. University of Ark.*, 938 F.2d 111 (8th Cir. 1991).

106. *Mitchell v. Peralta Community College Dist.*, 766 F. Supp. 834 (N.D. Cal. 1991).

107. *Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3d Cir. 1991).

108. *Austen v. Hawaii*, 759 F. Supp. 612 (D. Haw. 1991).

109. *Milligan-Jensen v. Michigan Technological Univ.*, 767 F. Supp. 1403 (W.D. Mich. 1991).

110. *Alvarado v. Board of Trustees of Montgomery Community College*, 928 F.2d 118 (4th Cir. 1991).

111. 29 U.S.C. § 621-634.

ing from an employee's award in an age discrimination case.¹¹² This year, the First Circuit Court ruled that unless the insurance company elected to prohibit the recovery of damages in an age discrimination suit, it was obligated to cover the damage award when its insured institution was found in violation of the law.¹¹³

The question of tolling came before the court in several of these cases. An Illinois university employee's age discrimination suit was not time barred until the court determined when the professor possessed sufficient knowledge to determine that he had a potential age discrimination claim.¹¹⁴ An employee, who waited 312 days after the termination notice to file an age discrimination claim, failed to establish reasons for the use of equitable tolling.¹¹⁵ The tolling period allowed 300 days after the violation to file a claim. An Illinois case involved the tolling of the two year statute of limitations in an age discrimination case where an early retirement plan was alleged to be a subterfuge for discrimination.¹¹⁶ Tolling commenced at the time the plan was adopted.

A procedural question involved the application of Eleventh Amendment immunity provisions. A Washington court found that because of immunity the institution could not be sued, but the state employees could be sued individually in their official capacities, although not in their individual capacities.¹¹⁷

Retirement practices were again before the courts. An Indiana university discontinued payment of its share of the retirement benefits when the employee reached the "normal retirement age." A federal district court found matters to be triable and denied a summary judgment motion by the university.¹¹⁸ The Eleventh Circuit Court of Appeals found that the use of market value factors to attract new faculty was a legitimate business interest and not discriminatory.¹¹⁹ However, the university's salary scheme left issues to be settled in a new trial.

In a class action ADEA claim, the issue of certification of the class was before the court. The court ruled that ADEA claims come under the "opt in" provisions. Each potential member of the class must act affirmatively to be included in the case.¹²⁰ This was found to be the case because of congres-

112. See *THE YEARBOOK OF EDUCATION LAW* 1990 at 201, *Andover Newton Theological Sch. Inc. v. Continental Casualty Co.*, 901 F.2d 1 (1st Cir. 1990).

113. *Andover Newton Theological Sch. Inc. v. Continental Casualty Co.*, 930 F.2d 89 (1st Cir. 1991).

114. *Davidson v. Board of Governors of State Colleges and Univs. for W. Ill. Univ.*, 920 F.2d 441 (7th Cir. 1990).

115. *Kraemer v. University of Minn.*, 752 F. Supp. 283 (D. Minn. 1990).

116. *EEOC v. City Colleges of Chicago*, 944 F.2d 339 (7th Cir. 1991).

117. *Jones v. University of Wash.*, 814 P.2d 1236 (Wash. Ct. App. 1991).

118. *Bell v. Trustees of Purdue Univ.*, 761 F. Supp. 1360 (N.D. Ind. 1991).

119. *MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991).

120. *Shushan v. University of Colo. at Boulder*, 132 F.R.D. 263 (D. Colo. 1990).

sional intent to limit the nature of class action suits under this law giving the court a passive duty in class action cases under the ADEA.¹²¹

The Rehabilitation Act

The Rehabilitation Act of 1973 saw several cases litigated. One case involved an employee who was handicapped because of neck and back injuries. She sued the university because it failed to provide assistance during an office move and to accommodate the employee's handicap after the move.¹²² On appeal a federal circuit court affirmed the lower court's summary judgment award to the defendant, not because the issue was time barred, but rather because the Rehabilitation Act did not allow the award of compensatory damages for pain and suffering.

In another case involving a medical student, the court on appeal reversed a summary judgment finding that the dyslexic student was an "otherwise qualified" handicapped individual.¹²³ In another student case, the court found that issues remained to be determined as to whether the institution knew that a handicap existed which required accommodation in the seats in lecture halls where the handicapped student attended class.¹²⁴ Meetings and letters of the student and the administrator left it unclear as to whether the student communicated the existence of a handicap and the need for accommodation.

Hiring Discrimination

A hiring case involved a candidate for the position of director of public security at a state university. The institution decided not to hire a candidate for a job after receiving a background check completed by a private investigator. The candidate was originally told that he would be hired pending the outcome of this investigation. The applicant sued to acquire the contents of the report plus tape recordings and notes in the possession of the private investigator. The court ruled that the notes and recordings still in the possession of the private investigator were public documents to which the plaintiff should be given access.¹²⁵

Faculty Employment

Faculty employment issues were litigated on a number of fronts. Nonrenewal of probationary faculty and denial of tenure involved questions

121. *Id.* at 269.

122. *Eastman v. Virginia Polytechnic Inst. and State Univ.*, 939 F.2d 204 (4th Cir. 1991).

123. *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19 (1st Cir. 1991).

124. *Nathanson v. Medical College of Pa.*, 926 F.2d 1368 (3d Cir. 1991).

125. *Pathmanathan v. St. Cloud State Univ.*, 461 N.W.2d 726 (Minn. Ct. App. 1990).

of either a breach of contract or violations of federal regulations involving discrimination in employment. Tenured faculty were terminated for cause raising procedural and contractual issues. Financial exigencies and issues surrounding part-time faculty were also before the courts. The section leads off with First Amendment speech issues.

First Amendment Rights

The initial case in this area involves a faculty member at a New York university who made a number of pronouncements about feminism, homosexuality, and the intellectual capabilities of African Americans. The institution commissioned a committee to investigate his actions. He filed suit alleging that institutional actions or failures to act on his behalf resulted in a chilling effect on his First Amendment speech rights. The court found that justiciable issues existed negating defendants summary judgment motion.¹²⁶ An Alabama federal district court ruled that an institution's order that a faculty member refrain from mentioning his personal religious beliefs in his classes and the scheduling of optional classes on Christian perspectives was a violation of First Amendment rights.¹²⁷ On appeal the Eleventh Circuit Court found that the institution had the right to control the content of its curriculum. The court ruled that the memorandum did not infringe on the plaintiff's First Amendment rights in the classroom where the university must have the final say on content issues.¹²⁸ Additionally, the university order only required that he totally disassociate any obligations that might be implied to his students when he holds and extends invitations to attend "optional" classes on Christian perspectives. The Colorado Supreme Court ruled that the termination of a grievance procedure when a black female employee of the university wrote to a state senator before the procedures were completed did not violate the woman's First Amendment speech rights.¹²⁹ The professor had selected a grievance procedure which was closed and required that no other remedies be sought until after the proceedings were completed.¹³⁰

Protected speech or speech as a matter of public concern were before the courts in several cases. A Wisconsin court ruled that the release of survey questions on mall shopper's attitudes was a matter of public concern overshadowing the survey research unit's need for confidentiality.¹³¹ The termination of the university research employee was infringement of his First

126. *Levin v. Harleston*, 752 F. Supp. 620 (S.D.N.Y. 1990).

127. See THE YEARBOOK OF EDUCATION LAW 1991 at 202, *Bishop v. Aronov*, 732 F. Supp. 1562 (N.D. Ala. 1990).

128. *Bishop v. Aronov*, 926 F.2d 1066, 1076 (11th Cir. 1991).

129. *Kemp v. State Bd. of Agric.*, 803 P.2d 498 (Colo. 1990).

130. *Id.* at 504.

131. *Barnhill v. Board of Regents of Univ. of Wis. Sys.*, 462 N.W.2d 249 (Wis. Ct. App. 1990).

Amendment rights and damages were awarded. A federal court ruled that the speech of an aggrieved university employee concerning his salary was not a matter of public concern.¹³² Statements by a Mississippi community college faculty member about the employment of a relative of the president of the board of trustees were not matters of public concern raising First Amendment issues.¹³³ Furthermore, the court found that the faculty member was terminated when her program was eliminated due to declining enrollment.

Nontenured Probationary Faculty

Nontenured faculty litigated issues involving both the decision not to renew a contract for term and the decision to deny tenure. Some of the cases in this section involve claims of discrimination or violations of procedures.

The Nonrenewal Decision. Nonrenewal controversies surround the nature of the contract and breaches of that contract. An Illinois faculty member employed on a one-year contract was not given proper notice of nonrenewal as stipulated in the faculty handbook.¹³⁴ The court ruled that failure to notify was a breach of contract and subsequently awarded damages as well as reinstatement until proper notification requirements could be met. A New Jersey case involved the question of whether an employee, who was given one-year contracts for thirteen years for various teaching positions, had acquired tenure.¹³⁵ The court found that a state statute made "tenure a mandatory term and condition of employment" of teachers in the county and state colleges.¹³⁶ This law was in conflict with a law which gives the state board of higher education the authority to award tenure.

In a breach of contract claim, the appeals court found error in a lower court's refusal to issue a continuance to the defendant faculty member.¹³⁷ The case involved a suit by an institution to recover wages from a faculty member who left the institution for another position in the middle of a contract year. In a case involving twin nuns and a catholic university, the court found that it should be left to a jury to determine if religious doctrine required the termination of the nuns' contract at the behest of the nuns' religious order.¹³⁸ An Illinois court ruled that a decision not to renew an employee's year-to-year contract was not preformation conduct interfering with the contract but rather postformation conduct not covered by the civil rights statutes.¹³⁹

132. *Ayoub v. Texas A & M Univ.*, 927 F.2d 834 (5th Cir. 1991).

133. *Dodds v. Childers*, 933 F.2d 271 (5th Cir. 1991).

134. *Arneson v. Board of Trustees, McKendree College*, 569 N.E.2d 252 (Ill. App. Ct. 1991).

135. *Dugan v. Stockton State College*, 586 A.2d 322 (N.J. Super. Ct. App. Div. 1991).

136. *Id.* at 325.

137. *Board of Supervisors of La. State Univ. and Agric. v. Holt*, 572 So. 2d 759 (La. Ct. App. 1990).

138. *Welter v. Seton Hall Univ.*, 579 A.2d 332 (N.J. Super. Ct. App. Div. 1990).

139. *Chawla v. Klapper*, 743 F. Supp. 1284 (N.D. Ill. 1990).

Denial of Tenure. Denial of tenure is another area where litigation occurred. In one case, triable issues existed in a black female faculty member's claim that discrimination and retaliation motivated the institution's decisions not to convert her position to a tenured position and not to promote her to full professor.¹⁴⁰ There was significant documentation for both the discrimination claim and the retaliation claim in the federal district court decision which granted summary judgment to the defendant institution on the section 1981 claim but denied it on the other claims. In another opinion on the same case, the court issued a preliminary injunction ordering the reinstatement of the plaintiff pending trial.¹⁴¹

In a case involving a theological seminary, a lower court found that a civil court lacked authority over religious matters. A terminated faculty member claimed that the previous president had guaranteed him tenure. On appeal the state court ruled that the conflict was based on ecclesiastical interests and that the faculty member's contract rights would best be settled through the seminary's grievance procedures.¹⁴²

Access to tenure review files was before the court in a California case.¹⁴³ The court ruled that an education code requiring complete access to personnel files was contrary to provisions providing state immunity from legislative regulation guaranteed to public universities under the state constitution. Furthermore, the court ruled that denial of access to personnel files did not violate either privacy rights or due process.

Violations of civil rights were alleged in several nontenured faculty cases. A female faculty member alleged both gender and handicap discrimination in her denial of tenure at a private institution in South Dakota. The court found that the plaintiff did not establish poor teacher evaluations as a pretext for discrimination under title VII or the Rehabilitation Act.¹⁴⁴

In a Puerto Rico age discrimination case, the instructor charged that the institution failed to renew his full-time service contract because of age.¹⁴⁵ Based on statements of university officials and the hiring of a younger, part-time instructor to teach some of the department's courses, the court affirmed the jury verdict of age discrimination and damage award. However, the court reduced the damage award because the instructor, without a doctorate degree, was not eligible for the advertised tenure position in the department.

A female faculty member, who had just given birth to a child, turned down a new contract because of short notice and her inability to acquire child

140. *Saunders v. George Washington Univ.*, 768 F. Supp. 854 (D.D.C. 1991).

141. *Saunders v. George Washington Univ.*, 768 F. Supp. 843 (D.D.C. 1991).

142. *Alicea v. New Brunswick Theological Seminary*, 581 A.2d 900 (N.J. Super. Ct. App. Div. 1990).

143. *Scharf v. Regents of Univ. of Cal.*, 286 Cal. Rptr. 227 (Ct. App. 1991).

144. *Brouard-Norcross v. Augustana College Ass'n*, 935 F.2d 974 (8th Cir. 1991).

145. *Watlington v. University of P.R.*, 751 F. Supp. 318 (D.P.R. 1990).

care.¹⁴⁶ A state court found that she could not claim discrimination when she could not establish that she had been terminated.

A faculty member who was denied tenure could not show that his low ratings in all five areas used to determine tenure were a pretext for discrimination.¹⁴⁷ In a Maine tenure review case, the court found that a letter on the tenure candidate solicited from a student was subject to "conditional privilege," voiding the professor's claims of libel and interference with a new contract.¹⁴⁸

Part-time Faculty

Part-time faculty cases emerged in the courts again this year. A lecturer, who was promised renewal of his contract based on satisfactory performance, was able to overcome a defendant's summary judgment award on appeal.¹⁴⁹ In Alabama, a court ruled that the two-year statute of limitations barred a part-time instructor's discrimination suit over his nonreappointment.¹⁵⁰ The Oklahoma Supreme Court ruled that the state constitution prohibited a state judge from also holding a compensated teaching position at a public educational institution.¹⁵¹ Finally, the denial of unemployment benefits to a part-time college teacher was upheld in an Illinois court.¹⁵²

Tenured Faculty

Termination for Cause. Termination for cause of tenured faculty continues to be an area of litigation. One controversy surrounded the nature of the tenure contract. A Maryland case involved the question of the continuation of faculty contractual rights in the reorganization of a community college from the city of Baltimore to the state.¹⁵³ The legislative provisions transferring ownership provided that neither party would be responsible for neither the contracts nor the liabilities of the old community college unless expressly assumed by the new board. The new college's three-year evaluation to determine its continued existence, which included a determination of individual faculty continuing employment, did not violate due process rights or rights under the abrogated contract. In another Maryland case involving the same community college but prior to the

146. *White v. University of Mass. at Boston*, 574 N.E.2d 356 (Mass. 1991).

147. *Villanueva v. Wellesley College*, 930 F.2d 124 (1st Cir. 1991).

148. *Lester v. Powers*, 596 A.2d 65 (Me. 1991).

149. *Courtney v. University of Tex. Sys.*, 806 S.W.2d 277 (Tex. Ct. App. 1991).

150. *Lufkin v. McCallum*, 752 F. Supp. 421 (N.D. Ala. 1990).

151. *Brown v. Lillard*, 814 P.2d 1040 (Okla. 1991).

152. *Campbell v. Department of Employment Sec.*, 570 N.E.2d 812 (Ill. App. Ct. 1991).

153. *Gardiner v. Tschechelnin*, 765 F. Supp. 279 (D. Md. 1991).

transfer of ownership, the court found that a faculty member who became an administrator did not lose his tenure when he signed an administrative contract.¹⁵⁴ The court noted that college policy indicated that specific action to terminate a tenured contract must be taken by the board.

A Michigan case involved attempts to dismiss without due process a newly-hired tenured faculty member.¹⁵⁵ It was discovered that as an applicant for the job, the faculty member had lied about a number of incidences of sexual contact with clients. The institution knew about one incident which resulted in his loss of a professional license and resignation from the previous employing institution's faculty. However, he was dishonest when asked at the interview if there had been other instances of sexual contact with clients. Later, other allegations from the previous community came to light. The court found that the lying did not negate the institution's mandate to guarantee him due process as a tenured faculty member.

Serious deficiencies in a tenured faculty member's performance ultimately resulted in termination.¹⁵⁶ A federal district court judge issued a summary judgment on behalf of the institution finding that the defendant failed to establish a *prima facie* case for age, race, or national origin discrimination.

A number of cases involved the award of damages in termination cases. A Colorado court awarded a faculty member back pay and reinstatement to his tenured faculty position but was not in error, according to the appellate judge, in refusing to award attorney fees.¹⁵⁷ In a Kentucky case on appeal, the court concluded that a successful faculty member's compensatory award should not include accumulated sick leave.¹⁵⁸ A Tennessee professor, terminated for misuse of institutional computer funds for a private consulting business, was exonerated and awarded damages. The question before the court on appeal was whether diligence was used in finding another position. The state supreme court found that damage to his reputation made it impossible for him to find another position in the interim.¹⁵⁹ Additionally, the court found that it would be unreasonable to expect him to give up a lucrative private consulting business to pursue a national search.

Termination for Financial Exigency. Several cases involved terminations emanating from a financial exigency. A Michigan case involved a professor, released for economic reasons, who claimed discrimination based on race.¹⁶⁰ On appeal the court found the proffered reason to be valid. Furthermore, the court observed that rather than simply showing that race

154. *Durham v. Fields*, 588 A.2d 352 (Md. Ct. Spec. App. 1991).

155. *Garner v. Michigan State Univ.*, 462 N.W.2d 832 (Mich. Ct. App. 1990).

156. *Al-Hashimi v. Scott*, 756 F. Supp. 1567 (S.D. Ga. 1991).

157. *Hunter v. Colorado Mountain Junior College Dist.*, 804 P.2d 277 (Colo. Ct. App. 1990).

158. *Gibson v. Kentucky State Univ.*, 799 S.W.2d 38 (Ky. 1990).

159. *Frye v. Memphis State Univ.*, 806 S.W.2d 170 (Tenn. 1991).

160. *Reisman v. Regents of Wayne State Univ.*, 470 N.W.2d 678 (Mich. Ct. App. 1991).

was a factor in the institution's decision to terminate, she failed in her burden of showing that race was the determining factor in the decision.

Denial of Employee Privilege. The lead off case in this section involved denial of privileges because of First Amendment protected pronouncements.¹⁶¹ The faculty member alleged that pronouncements on academic standards resulted in his lower salary and denial of a summer teaching assignment. The Fifth Circuit Court ruled that his pronouncements were not matters of public concern and could not be retrospectively embellished in an attempt to elevate them from matters of personal concern.¹⁶² A New York assistant professor claimed he was denied promotion because of his national origin. A federal district court found that his failure or tardiness in the performance of certain duties was the sole and valid reason for the promotion denial.¹⁶³ An Iowa professor successfully maintained a claim that gender discrimination resulted in a hostile work environment and denial of promotion to a full professorship.¹⁶⁴ The court awarded her the rank of full professor and back pay, finding her fully qualified for this rank.

Several cases involved the denial of certain privileges to faculty. An Ohio faculty member lost a claim that his contract guaranteed him no contact with undergraduate dental students and guaranteed him \$25,000 annually from his private dental contract.¹⁶⁵ Another Ohio court found that it was an administrative prerogative to deny a clinical psychology faculty member access to clients in the clinic.¹⁶⁶ The denial of a physician's use of equipment reserved for faculty in the teaching program was consistent with institutional objectives.¹⁶⁷ Public censorship and an order barring a female faculty member from holding administrative positions after due process was completed was upheld.¹⁶⁸ The faculty member was found to have been involved in "seriously negligent scholarship" in her research, which was recently published, and in her dissertation.

Several other cases involved denials of sabbaticals. In one case, the court found the suit frivolous where a collective bargaining union was sued for failing to support a faculty member's request to bring a grievance to arbitration.¹⁶⁹ In another case, material issues existed as to whether the denial of sabbatical leave was a pretext for discrimination.¹⁷⁰

161. *Dorsett v. Board of Trustees for State Colleges and Univs.*, 940 F.2d 121 (5th Cir. 1991).

162. *Id.* at 125.

163. *Sinha v. State Univ. of N.Y. at Farmingdale*, 764 F. Supp. 765 (E.D.N.Y. 1991).

164. *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990); see *Jew v. University of Iowa*, 398 N.W.2d 861 (Iowa 1987).

165. *Diener v. Ohio State Univ.*, 573 N.E.2d 217 (Ohio Ct. Cl. 1990).

166. *Nikelly v. Stubing*, 562 N.E.2d 360 (Ill. App. Ct. 1990).

167. *Nawaz v. University Hosp. State Univ. of N.Y. at Stony Brook*, 560 N.Y.S.2d 878 (App. Div. 1990).

168. *Newman v. Burgin*, 930 F.2d 955 (1st Cir. 1991).

169. *Leahy v. Board of Trustees of Community College Dist. No. 508*, 912 F.2d 917 (7th Cir. 1990).

170. *Truelove v. Trustees of Univ. of D.C.*, 744 F. Supp. 307 (D.D.C. 1990).

A Virginia law professor filed suit to recover damages under the Workers' Compensation Act for defamation and injury to his reputation.¹⁷¹ The court found such remedies unavailable under the Workers' Compensation Act. The Alaska Administrators Procedures Act was the proper venue to conduct a grievance over a tenure dispute.¹⁷²

Administrators and Staff

All Employees

Terminations of administrator and staff members involved litigation over jurisdictional issues, constitutional rights, contract terms, and the award of damages. Jurisdictional and court procedural questions lead off this section. For example, the Idaho Supreme Court, affirming a lower court summary judgment, ruled that the plaintiff, an employee on medical leave who failed to return to her job, had not filed notice under the Tort Claims Act.¹⁷³ The plaintiff also failed to show that the administrators acted in ways other than those expected of them in their respective positions. However, a North Carolina court found that the discharged employee was not given adequate opportunity to defend against an institution's summary judgment motion.¹⁷⁴ A federal circuit court rejected a qualified immunity defense for a police officer's denial of any knowledge or involvement in the charged offense.¹⁷⁵ The Supreme Court of Alabama refused to stay a civil action by an employer who notified authorities of a proprietary institution's alleged misuse of Pell Grant refunds.¹⁷⁶ The institution's officer's rights of protection against self-incrimination were not violated when material facts resulting from this civil action became part of a pending criminal action. In the District of Columbia, a private university employee's EEOC claim was time barred.¹⁷⁷ The Seventh Circuit Court of Appeals ruled that sovereign immunity blocked a suit by a former employee against a state institution's board of trustees and its affiliated athletic association.¹⁷⁸ In Pennsylvania, a terminated "whistle blowing" employee's federal claims were kept while state law claims were remanded by a federal court.¹⁷⁹

Constitutional questions were also raised in the termination of administrators and staff. An Oregon court ruled that yearly evaluations of the holder of a one-year contract did not make a nonrenewal decision a quasi judicial

171. *Snead v. Harbaugh*, 404 S.E.2d 53 (Va. 1991).

172. *McGrath v. University of Alaska*, 813 P.2d 1370 (Alaska 1991).

173. *Pounds v. Derison*, 816 P.2d 982 (Idaho 1991).

174. *Locus v. Fayetteville State Univ.*, 402 S.E.2d 862 (N.C. Ct. App. 1991).

175. *Elliott v. Thomas*, 937 F.2d 338 (7th Cir. 1991).

176. *Ex parte Coastal Training Inst.*, 583 So. 2d 979 (Ala. 1991).

177. *Harper v. Georgetown Univ.*, 748 F. Supp. 6 (D.D.C. 1990).

178. *Kroll v. Board of Trustees of Univ. of Ill.*, 934 F.2d 904 (7th Cir. 1991).

179. *Seal v. University of Pittsburgh*, 766 F. Supp. 386 (W.D. Pa. 1991).

procedure requiring due process.¹⁸⁰ In the dismissal of a vocational education director, the Mississippi Supreme Court ruled that due process procedures, which included notice, a hearing, and the presence of a board attorney, protected the employee's rights.¹⁸¹ Also, substantial evidence existed to support the decision.

The termination of a director of a library and resumption of full-time faculty duties were completed after adequate due process procedures were followed.¹⁸² A senior secretary whose position was eliminated did not have a property interest requiring due process prior to termination.¹⁸³ However, failure to follow policy and to serve notice of a hearing as required by policy within seven months of the termination of an administrator was a violation of her due process rights.¹⁸⁴ A city department could terminate without due process a police officer it determined had been arrested on a number of occasions for engaging in illicit homosexual activity in a university campus restroom.¹⁸⁵

First Amendment issues were involved in several cases. A university employee, reassigned to a new position and eventually terminated after he decided to run for a seat in the state legislature, successfully defended against an institution's summary judgment motion.¹⁸⁶ Triable issues existed on the First Amendment claim.

The employment contract and its terms were also litigated. In one case, a county court ruled that it could proceed with a breach of contract claim only on a *de novo* basis since it lacked statutory authority over college matters.¹⁸⁷ The Tenth Circuit Court of Appeals found that issues existed as to whether the president of the institution had the authority to terminate an at will employee during a contract period.¹⁸⁸

A procedural question revolved around an arbitrator's reduction of the termination of an employee to a two-month suspension. The New York court found that the hospital's interest in public health was clearly violated when the employee used the same syringe on several critically ill patients and that employment termination was appropriate.¹⁸⁹ An institution's decision not to promote an officer based on poor performance met the rational basis test.¹⁹⁰ Furthermore, a performance evaluation system did not mandate due process requirements.

180. *Machunze v. Chemeketa Community College*, 810 P.2d 406 (Or. Ct. App. 1991).

181. *Hoffman v. Board of Trustees, E. Miss. Junior College*, 567 So. 2d 838 (Miss. 1990).

182. *Warren v. University of Ala. in Huntsville*, 579 So. 2d 1375 (Ala. Civ. App. 1991).

183. *Woolsey v. Hunt*, 932 F.2d 555 (6th Cir. 1991).

184. *Seminara v. Niagara County Community College*, 565 N.Y.S.2d 671 (App. Div. 1991).

185. *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991).

186. *Johnson v. Wefald*, 766 F. Supp. 977 (D. Kan. 1991).

187. *Sinha v. Board of Trustees Del. Technical & Community College*, 585 A.2d 1310 (Del. Super. Ct. 1990).

188. *Archer v. Sanchez*, 933 F.2d 1526 (10th Cir. 1991).

189. *State Univ. of N.Y. v. Young*, 566 N.Y.S.2d 79 (App. Div. 1991).

190. *Dramis v. Nassau County Community College*, 570 N.Y.S.2d 597 (App. Div. 1991).

The court upheld an administrative panel ruling that the institution could not withhold reappointment until after the employee produced a master's degree certificate after a two-year educational leave of absence.¹⁹¹ A terminated women's basketball coach, charged with misuse of travel funds, was exonerated and awarded damages on her breach of contract and slander claims.¹⁹² However, the court adjusted downward the award for slander because it exceeded the allowable award. The tenure contract of a community college faculty member did not cover summer school appointments.¹⁹³ A West Virginia court held that an employee of a unit who headed up a number of externally funded projects had, over time, acquired seniority under the institution's policies and could not be terminated when the current project under which she was employed lost its funding.¹⁹⁴

Employee Benefits

A variety of employee benefits, including methods to determine salaries, types of available leaves, retirement settlements, and disability protections, were litigated this year. For example, a resident of a university hospital sued when she was not rotated through its chief resident which the court found to be a property interest.¹⁹⁵ A class of nonfaculty sued to enforce the university's employment manual provisions requiring annual performance evaluations for the purpose of determining merit pay.¹⁹⁶ Failure to follow adopted procedure in arriving at merit pay was an arbitrary action by the board. The court found that this claim was not a claim for compensatory damages barred by the state's sovereign immunity clause.

Issues surrounding leaves of absence were also litigated. An Ohio court ruled that sick leave provisions did not restrict the use of sick leave for the illness of a family member other than the employee.¹⁹⁷ At a Louisiana public university, unclassified employees sued for reimbursement of unused compensatory leave days.¹⁹⁸ The court dismissed the claims of the retired employees, finding that there was no property interest or contractual agreement to yield an expectation of entitlement to the accumulated benefits.¹⁹⁹

Retirement cases involved several different issues. One case reviewed a chapter 7 bankruptcy. A professor successfully sustained a claim that interest on his state retirement money was not part of the estate under the

191. *Johnson v. Lawson State Junior College*, 581 So. 2d 865 (Ala. Civ. App. 1991).

192. *Moss v. Stockard*, 580 A.2d 1011 (D.D.C. 1990).

193. *Frame v. Board of Trustees of Spoon River Community College*, 571 N.E.2d 519 (Ill. App. Ct. 1991).

194. *West Virginia Univ. v. Sauvageot*, 408 S.E.2d 286 (W. Va. 1991).

195. *Ezekwo v. New York City Health & Hosp. Corp.*, 940 F.2d 775 (2d Cir. 1991).

196. *Breazeale v. Board of Trustees of Univ. of S. Ala.*, 575 So. 2d 1126 (Ala. Civ. App. 1991).

197. *Steinhour v. Ohio State Univ.*, 577 N.E.2d 413 (Ohio Ct. App. 1989).

198. *Knecht v. Board of Trustees for State Colleges & Univ.*, 577 So. 2d 730 (La. Ct. App. 1991).

199. *Id.* at 732.

bankruptcy statute.²⁰⁰ In another bankruptcy case, the court found that interest on a supplemental retirement account was property of the estate.²⁰¹ A Florida court overturned the state retirement director's ruling that certain temporary employees must enroll in the state retirement system.²⁰² The court found that the director's decision went beyond the stipulated facts. An Illinois court found that the institution and the retiree reached "accord and satisfaction" when the institution sent the retiree a letter and a check for only 20% of his accrued sick leave which he later cashed.²⁰³ Finally, a New York court found that a faculty member was not eligible for accidental disability retirement benefits and was still able to perform her duties as a professor.²⁰⁴

Sexual Harassment

Procedural questions were addressed when a faculty member of a public university's military studies department became the defendant in a sexual harassment claim brought by a female employee.²⁰⁵ The district court denied the defendant's move to dismiss the case and found that the United States, as represented by a member of the armed services, was a defendant in the case. A North Dakota student was barred by sovereign immunity from bringing a sexual assault suit against a public university professor.²⁰⁶ The student alleged that she was assaulted by the professor while attending a professional meeting out of state.

Damages in some cases were awarded where sexual harassment claims were successful. However, the California Supreme Court ruled that a lower court incorrectly awarded compensatory damages in a sexual harassment claim.²⁰⁷ A Wisconsin federal district court ruled that an attorney fee with 24% enhancement was appropriate for civil rights work in Milwaukee. The fee was awarded to an assistant professor's attorneys who successfully brought a sexual harassment claim against her supervisor and the institution.²⁰⁸

Collective Bargaining

Collective bargaining issues surround questions of jurisdiction, bargaining unit definition, unfair labor practices, grievance procedures, and em-

200. *In re Childs*, 129 B.R. 14 (Bankr. D. Conn. 1991).

201. *Richardson v. TIAA/CREF*, 123 B.R. 540 (E.D.N.C. 1991).

202. *Palm Beach Community College v. State Dep't of Admin., Div. of Retirement*, 579 So. 2d 300 (Fla. Dist. Ct. App. 1991).

203. *Nieburg v. Community College Dist.* No. 522, 576 N.E.2d 1134 (Ill. App. Ct. 1991).

204. *Morrissey v. Regan*, 573 N.Y.S.2d 786 (App. Div. 1991).

205. *McHugh v. University of Vt.*, 758 F. Supp. 945 (D. Vt. 1991).

206. *Leadbetter v. Rose*, 467 N.W.2d 431 (N.D. 1991).

207. *Peralta Community College Dist. v. Fair Employment and Housing Comm'n*, 801 P.2d 357 (Cal. 1990).

208. *King v. Board of Regents of Univ. of Wis. Sys.*, 748 F. Supp. 686 (E.D. Wis. 1990).

ployee-employer consultation mechanisms. The Vermont Federal District Court refused to grant jurisdiction over a ruling by the National Labor Relations Board that found that the University of Vermont was a public institution not governed by the National Labor Relations Act.²⁰⁹

Certification of the bargaining unit to bargain collectively was also before the courts. A New York court refused to decertify an adjunct faculty association and replace it with the local federation of teachers group.²¹⁰

The collection of employees' agency shop fees by the collective bargaining agent was before the Supreme Court.²¹¹ The Court ruled that employees could be billed costs of the state and national affiliates even if those costs did not directly benefit the local bargaining unit. However, the objecting employees could not be billed for lobbying activities. Finally, even when a strike was illegal under state law, the employees could be charged union shop fees for strike preparations.

Nonunion members sought an injunction to stop the collection of agency shop fees.²¹² In one ruling, the court found that the nonunion employees could sustain an action for constitutional violations against institutional officers. The nonunion employees then sought an injunction while they pursued litigation on the collections as a violation of their constitutional rights.²¹³ The court ordered the injunction, finding the collection scheme to be in violation of the nonunion members' constitutional rights. The federal district court on remand ordered the disclosure of the identity of state affiliates and the national organizations receiving payments from the union and audited the financial accounting within those organizations to determine the uses of those payments.²¹⁴

A Pennsylvania collective bargaining unit of a state related university sought to stay an injunction based on state law which prohibited a strike.²¹⁵ Subsequently, on reargument the court ruled the case moot since the strike was over.²¹⁶

An institution did not exercise unfair labor practices when it changed the qualifications of adjunct faculty members' positions after the collective bargaining agreement had expired.²¹⁷ The New York Court of Appeals

209. *University of Vt. v. Vermont*, 748 F. Supp. 235 (D. Vt. 1990).

210. *County of Nassau v. New York Pub. Employment Relations Bd.*, 561 N.Y.S.2d 895 (N.Y. 1990).

211. *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991); see THE YEARBOOK OF EDUCATION LAW 1990 at 221, *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1473 (W.D. Mich. 1988), *aff'd*, 881 F.2d 1388 (6th Cir. 1989).

212. *Weaver v. University of Cincinnati*, 758 F. Supp. 446 (S.D. Ohio 1991).

213. *Weaver v. University of Cincinnati*, 942 F.2d 1039 (6th Cir. 1991).

214. *Weaver v. University of Cincinnati*, 764 F. Supp. 1241 (S.D. Ohio 1991).

215. *Temple Ass'n of Univ. Professionals, AFT Local 4531 v. Temple Univ.*, 582 A.2d 63 (Pa. Commw. Ct. 1990).

216. *Temple Univ. v. Temple Ass'n of Professionals, AFT Local 4531*, 591 A.2d 1140 (Pa. Commw. Ct. 1991).

217. *County of Nassau v. New York Pub. Employment Relations Bd.*, 561 N.Y.S.2d 895 (N.Y. 1990).

found that the labor board was in error in relying on the expired contract. However, the failure of an institution to initiate the final step raise in an expired collective bargaining agreement was an unfair labor practice.²¹⁸ Changes in the Illinois University Civil Service Board seniority rules were a management prerogative and not an unfair labor practice.²¹⁹

Negotiating a change in the mandatory retirement age to seventy was not an unfair labor practice when the person who retired during the negotiations at age sixty-five knew the change was being considered.²²⁰ In Florida, attorney fees could be awarded where the union prevailed on an unfair labor practice claim.²²¹ An Illinois public institution was found to have committed an unfair labor practice when it refused to honor oral agreements made during the collective bargaining negotiations.²²²

Grievance procedures, which affirmed the termination of a lab school elementary teacher at a university, were upheld in a state court.²²³ A state court found that a modification of the tasks of a classified employee to include duties at the next job classification level was a breach of the collective bargaining agreement, but the court modified the arbitrator's damage award.²²⁴ A terminated New York employee failed to establish a breach of duty case when the union refused a request to take the grievance to arbitration.²²⁵

A union sued a university claiming it ignored an employer-employee health care committee when it changed its health care plan without consultation.²²⁶ The court granted the institution summary judgment. An Ohio court affirmed a court of claims ruling that the collective bargaining contract had been breached when an institution changed a job description and failed to renegotiate the salary with the union.²²⁷ Finally, the Employee Retirement Income Security Act (ERISA)²²⁸ preempted state law claims of a nonemployer to a union's retirement fund.²²⁹

218. Jackson Community College Classified and Technical Ass'n, Mich. Educ. Support Personnel Ass'n, v. Jackson Community College, 468 N.W.2d 61 (Mich. Ct. App. 1991).

219. Board of Regents of Regency Univ. v. Illinois Educ. Labor Relations Bd., 560 N.E.2d 627 (Ill. App. Ct. 1990).

220. Walker v. Columbia Univ., 756 F. Supp. 149 (S.D.N.Y. 1991).

221. Hillsborough Community College Chapter of Faculty United Serv. Ass'n v. Board of Trustees of Hillsborough Community College, 578 So. 2d 12 (Fla. Dist. Ct. App. 1991).

222. Board of Regents of Regency Univs. v. Illinois Educ. Labor Relations Bd., 566 N.E.2d 963 (Ill. App. Ct. 1991).

223. Gruszczynski v. State Bd. of Higher Educ., 806 P.2d 1168 (Or. Ct. App. 1991).

224. Vermont State Colleges Staff Fed. v. Vermont State Colleges, 596 A.2d 355 (Vt. 1991).

225. Garvin v. New York State Pub. Employee Relations Bd., 562 N.Y.S.2d 565 (App. Div. 1990); see also City Univ. of N.Y. v. Banks-Fretheim, 564 N.Y.S.2d 78 (App. Div. 1990).

226. Cornell Univ. v. United Auto Workers Local 2300, 942 F.2d 138 (2d Cir. 1991).

227. Moore v. Youngstown State Univ., 578 N.E.2d 536 (Ohio Ct. App. 1989).

228. U.S.C. § 1101 *et seq.*

229. McCoy v. Massachusetts Inst. of Technology, 760 F. Supp. 12 (D. Mass. 1991).

Students

Admissions

A district court in Virginia determined that the state maintenance of an all-male military institute did not violate equal protection rights of females seeking a military-style education.²³⁰ In the decision, the court found that the support of a single-gender institution was of substantial government interest in order to maintain a constitutionally permissible form of diversity in the state's educational system. The single sex provisions at the Virginia Military Institute preserve a unique educational program based on "adversarial" and "barracks-oriented" education.

A Texas court certified Hispanics as a class which alleged that the state discriminated against persons of Hispanic origin in its higher education system in violation of the Texas Constitution.²³¹ The state court of appeals, affirming, found that the class representative had standing to litigation and that the trial court had jurisdiction to certify a class action.

Two cases involving reverse discrimination by unsuccessful applicants to professional schools which were previously litigated, were back in the courts on appeal. In Kansas, an unsuccessful white male sought, but was denied, a preliminary injunction for admittance into medical school while a civil rights action was brought against the university.²³² Subsequently, the district court granted a summary judgment to the university since even if equitable tolling were applied, the two-year statute of limitations for the filing of civil rights claims had expired. Tolling began when a letter was received informing him that he would not be admitted to the next first-year class.²³³ The other case, on remand from a federal circuit court, involved an unsuccessful, white male law school applicant who had been denied admission to a public law school eight times.²³⁴ The district court ruled that the plaintiff failed to establish a *prima facie* case of sex discrimination and issued a summary judgment to the institution on the title VI and monetary damage claim. However, the court found material issues existed on his retaliation claim.²³⁵ Letters may indicate a different treatment in the admission process after he filed suit.

A fifty-three-year-old New York psychologist charged age discrimination in his denial of admission to medical school.²³⁶ The court found that the

230. *United States v. Commonwealth of Va.*, 766 F. Supp. 1407 (W.D. Va. 1991).

231. *Clements v. League of United Latin American Citizens*, 800 S.W.2d 948 (Tex. Ct. App. 1990).

232. See *THE YEARBOOK OF EDUCATION LAW* 1990 at 223, *Baker v. Board of Regents of State of Kan.*, 721 F. Supp. 270 (D. Kan. 1989).

233. *Baker v. Board of Regents of State of Kan.*, 768 F. Supp. 1436 (D. Kan. 1991).

234. See *THE YEARBOOK OF EDUCATION LAW* 1988 at 249, *Davis v. Halpern*, 813 F.2d 37 (2d Cir. 1987).

235. *Davis v. Halpern*, 768 F. Supp. 968 (E.D.N.Y. 1991).

236. *Brown v. Albert Einstein College of Medicine of Yeshiva Univ.*, 568 N.Y.S.2d 61 (App. Div. 1991).

applicant's low test scores, GPA, and lack of science courses were valid nondiscriminatory reasons to deny admission.

The Missouri Supreme Court upheld a Board of Law Examiners' decision to deny registration for the bar exam to a law student who failed to meet moral character and general fitness requirements as defined by state law.²³⁷

In Pennsylvania, a physician claimed his liberty and property interests were violated. He was admitted to a hospital's three-year residency program in dermatology but later, before he could matriculate, the hospital announced its closing.²³⁸ The Third Circuit Court of Appeals affirmed a district court decision dismissing the complaint for failure to state a claim based on deprivation of either liberty or property interests.

In Missouri, an applicant to a police academy brought charges of libel and slander against members of the administration, alleging that he was falsely accused of cheating on the entrance examination.²³⁹ The court of appeals, reversing a lower court decision, found that the officer in charge of independent applicants did "publish" a statement accusing the applicant of cheating but found no evidence that the officer or director of the academy acted in malice to warrant libel and slander.

Nonresident Tuition

The Supreme Court of Kansas upheld a residence committee decision denying state resident status for fee purposes.²⁴⁰ The university committee's finding that the student failed in his burden of establishing a permanent residence in the state did not violate either the due process or equal protection clauses of the Fourteenth Amendment.

A terminated university employee in California sued the university on the grounds that undocumented alien students were being treated as residents for tuition purposes in violation of state statutes.²⁴¹ The court found that undocumented alien students are statutorily precluded from being classified as residents for tuition purposes. Furthermore, this preclusion does not deprive the undocumented alien students of equal protection of the laws.

Financial Aid

Questions surrounding financial aid once again saw heavy litigation. The issues ranged from institutional eligibility requirements, breach of contract with guarantor agencies, bankruptcy proceedings under chapter 7

237. *In re Alexander*, 807 S.W.2d 70 (Mo. 1991).

238. *Unger v. National Residents Matching Program*, 928 F.2d 1392 (3d Cir. 1991).

239. *Dvorak v. O'Flynn*, 808 S.W.2d 912 (Mo. Ct. App. 1991).

240. *Peck v. University Residence Comm. of Kan. State Univ.*, 807 P.2d 652 (Kan. 1991).

241. *Regents of the Univ. of Cal. v. Superior Ct.*, 276 Cal. Rptr. 197 (Ct. App. 1990).

and chapter 13, undue hardship, and child support for higher education. Litigation in all of these areas has continued to increase over the past few years. Several cases involved convictions for illegal activities by administrators working with financial aid. Mail fraud and conspiracy were at issue in an Illinois case.²⁴² A former student and office worker at a proprietary school was convicted of defrauding the federal government of student loan money for personal enrichment and income tax violations. A private business school in New York sought to keep the Tuition Assistance Agency from collecting a refund of moneys paid to students who graduated prior to completion of approved coursework.²⁴³ A New York appellate court affirmed an earlier decision which found that agency required refunds were consistent with applicable regulations and audit guidelines.

A chain of private business schools in New York alleged that the denial of guaranteed loans to their students represented "an unconstitutional taking of [its] property and liberty interests."²⁴⁴ The court affirmed the decision to dismiss all Eleventh Amendment claims against the state guaranteeing agency, but vacated it so a new judgment could be made to amend claims against specific individuals in the agency. In another case, the federal government was able to recover funds paid to a now bankrupt trade school in California.²⁴⁵ The moneys, authorized to the school under title IV appropriations, became trust funds upon their deposit and were never "property" of the school for preferential transfer uses under bankruptcy laws. In Rhode Island, a court of appeals held that amendments to the Higher Education Act did not abridge the guaranty agency's contractual right to receive reimbursements on guaranteed loans made prior to the adoption of the amendment.²⁴⁶ Finally, the federal government was granted a motion summarily enforcing a subpoena issued by the Inspector General upon a training academy.²⁴⁷ All records and documents relating to federal student financial aid programs administered at the academy were requested to determine the proprietary school's eligibility to participate in Pell and Stafford programs.

The Budget Reconciliation Act of 1987²⁴⁸ required state guaranteeing agencies to transfer excess funds back to the Department of Education. Waivers based on economic conditions could be granted by the Secretary of Education. In Georgia, a district court denied a request for waivers of this requirement stating that the decision was neither arbitrary nor capricious.²⁴⁹

242. *United States v. Johnson*, 927 F.2d 999 (7th Cir. 1991).

243. *Crown Business Inst. of Kings County, Inc. v. New York State Dep't of Audit & Control*, 564 N.Y.S.2d 795 (App. Div. 1990).

244. *Oliver Schs. Inc. v. Foley*, 930 F.2d 248 (2d Cir. 1991).

245. *In re California Trade Technical Schs., Inc.*, 923 F.2d 641 (9th Cir. 1991).

246. *Rhode Island Higher Educ. Assistance Auth. v. Secretary, United States Dep't of Educ.*, 929 F.2d 844 (1st Cir. 1991).

247. *United States v. Teeven*, 745 F. Supp. 220 (D. Del. 1990).

248. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. § 1330 *et seq.*

249. *Georgia Student Finance Comm'n v. Cavazos*, 761 F. Supp. 802 (N.D. Ga. 1991).

A waiver was granted, however, to the Rhode Island Higher Education Assistance Authority (RIHEAA), a precedent to the case discussed earlier,²⁵⁰ where the transfer of such excess funds could not be applied retroactively.²⁵¹

The procedures and qualifications concerning individual eligibility under financial aid programs were brought before the courts in several separate cases. In West Virginia, students filed for relief under the Higher Education Act of 1965 (HEA) to have their student loan obligations declared unenforceable.²⁵² The students alleged that the now defunct business college was inadequately staffed and equipped to properly train students, thus misrepresenting their ability to provide vocational training. The district court held that the HEA did not impliedly preempt school-related defenses under the state's consumer protection statute.²⁵³ The case has been certified and will go to trial. An Ohio student alleged that the school failed to return all remaining funds from her guaranteed student loan back to the lending agency after she left the academy. The Ohio court found that the Higher Education Act of 1965, which spelled out how institutions held student loan moneys should be applied to their education costs, did not establish a private right of action.²⁵⁴ In New Jersey, the court granted summary judgment for the state higher education assistance authority which sued a student who defaulted in his educational loan.²⁵⁵ A Pennsylvania law student, who as an undergraduate defaulted on a federally guaranteed loan, sought an injunction against the state agency for denial of a new loan application.²⁵⁶ The Pennsylvania bankruptcy court's decision allowing the state agency to make reasonable inquiry into future financial responsibility of the debtor on the form of educational loans was upheld by the district court.

A Maryland student brought a civil rights action challenging the university's scholarship program for black students.²⁵⁷ The district court held that the program, open only to black students, did not violate title VI. A Florida student, who as a welfare recipient under the Aid to Families with Dependent Children (AFDC) received tuition assistance, challenged as unconstitutional proviso language which required tuition recipients to exhaust all other means before receiving welfare tuition assistance.²⁵⁸ The state was ordered to remove all exceptions to the statute which provided an

250. See *Rhode Island Higher Educ. Assistance Auth. v. Secretary, United States Dep't of Educ.*, 929 F.2d 844 (1st Cir. 1991).

251. *Rhode Island Higher Educ. Assistance Auth. v. Cavazos*, 749 F. Supp. 414 (D.R.I. 1990).

252. *Tipton v. Secretary of Educ. of United States*, 768 F. Supp. 540 (S.D. W. Va. 1991).

253. *Id.* at 541, 545-546.

254. *Hudson v. Academy of Court Reporting, Inc.*, 746 F. Supp. 718 (S.D. Ohio 1990).

255. *New Jersey Higher Educ. Assistance Auth. v. Carlock*, 589 A.2d 671 (N.J. Super. Ct. Law Div. 1991).

256. *In re Richardson*, 27 B.R. 560 (Bankr. E.D. Pa. 1982).

257. *Podberesky v. Kirwan*, 764 F. Supp. 364 (D. Md. 1991).

258. *Murray v. Lewis*, 576 So. 2d 264 (Fla. 1990).

unconditional waiver of community college fees to welfare recipients in a training program.

With the federal deficit continuing to mount and the default rate of government loans escalating, bankruptcy cases involving holders of student loans have once again become substantial in number. In a Wisconsin case, the government was able to collect on a defaulted Health Education Assistance Loan (HEAL) loan which was declared nondischargeable by a bankruptcy court.²⁵⁹ In order for HEAL loans to be discharged in bankruptcy, all three statutory conditions must be satisfied.²⁶⁰ In this case, the second condition of unconscionability was the issue and the burden of initiating an inquiry was with the debtor.

There was a significant number of chapter 7 bankruptcy cases before the courts. In three cases, the courts did not find undue hardship as required for the discharge of educational loans.²⁶¹ A debtor in New York was denied discharge of his loans because he failed to show a good faith effort in repayment.²⁶² A Wisconsin court held that the existence of several forbearance agreements could not result in the loans being discharged because the five-year period from the due date of the first payment to collect the loan had tolled.²⁶³ A similar result was reached in several other cases.²⁶⁴ However, undue hardship was deemed as justified in an Oklahoma case after a review of the plaintiff's budget, and the student loan was discharged.²⁶⁵

In other chapter 7 bankruptcy cases, a federal court of appeals held that a California institution was immune from damages under the Eleventh Amendment when it refused to release transcripts of a students who had defaulted.²⁶⁶ In Pennsylvania, the court determined that the consolidation of a student loan under the Higher Education Act did not change the date the first loan payment became due.²⁶⁷ A fifty-three year old dentist in Kentucky, who suffered from arthritis and could no longer practice dentistry, sought to discharge his HEAL loan.²⁶⁸ In taking into account several financial factors, the court found it not to be unconscionable to deny the debtor a discharge of his loan. A bankruptcy court in Washington, D.C., refused an application by a debtor to move from the district court to the

259. *United States v. Wood*, 925 F.2d 1580 (7th Cir. 1991).

260. Public Health Service Act, *as amended*, 42 U.S.C.A. § 294(g).

261. *In re Boston*, 119 B.R. 162 (Bankr. W.D. Ark. 1990); *In re Simons*, 119 B.R. 589 (Bankr. S.D. Ohio 1990); *In re Zibura*, 128 B.R. 129 (Bankr. W.D. Pa. 1991).

262. *In re Garneau*, 122 B.R. 178 (Bankr. W.D.N.Y. 1990).

263. *In re Gremler*, 127 B.R. 202 (Bankr. E.D. Wis. 1991).

264. *Alleshouse v. State Student Assistance Comm'n*, 565 N.E.2d 340 (Ind. Ct. App. 1991); *In re Barciz*, 123 B.R. 771 (Bankr. N.D. Ohio 1990); *In re Georgina*, 124 B.R. 562 (Bankr. W.D. Mo. 1991).

265. *In re Johnson*, 121 B.R. 91 (Bankr. N.D. Okla. 1990).

266. *In re Gustafson*, 934 F.2d 216 (9th Cir. 1991).

267. *In re McKinney*, 120 B.R. 416 (Bankr. N.D. Ohio 1990).

268. *In re Emmett*, 127 B.R. 599 (Bankr. E.D. Ky. 1991).

bankruptcy court a civil suit by the federal government to collect on promissory notes.²⁶⁹

The courts also heard cases involving chapter 13 of the bankruptcy laws. Section 1325 of the Bankruptcy Code requires a bankruptcy court to confirm a chapter 13 plan if "the plan has been proposed in good faith and not by any means forbidden by laws."²⁷⁰ In a Utah case, the court did not confirm a plan because it was not proposed in good faith.²⁷¹ A similar decision using the good faith criterion to deny protection occurred in Ohio.²⁷² An Oregon district court affirmed the plan even though it proposed only a 4% payment of student loan debts.²⁷³ A debtor in Ohio was ordered to file an adversary proceeding to determine the dischargeability of the student loan debt.²⁷⁴ In Iowa, a bankruptcy court denied confirmation of an amended plan since the debtors failed to prove that a reasonable basis existed for their discriminatory classification of unsecured claims.²⁷⁵

There were three chapter 11 bankruptcy cases decided by the courts. In Illinois, former students were certified as a class in a claim against a chain of cosmetology schools. The class of students alleged the owners were involved in consumer fraud and violations of the Racketeer Influenced and Corrupt Organizations Act.²⁷⁶ Oklahoma parents' loan for the education of their child was a nondischargeable "educational loan" under the Bankruptcy Code.²⁷⁷ A Colorado debtor failed to establish undue hardship to discharge an education loan.²⁷⁸

Numerous service contracts were in dispute. The United States government filed claims against two physicians for defaulting in their agreements to serve in assigned health manpower shortage areas.²⁷⁹ The court held in both instances that the physicians were liable for damages for failure to fulfill their health service obligations. In two other cases participants in the National Health Service Corps scholarship program brought action against the federal government. In Washington, D.C., a physician challenged a decision by the government to deny a waiver of the program's service requirements.²⁸⁰ On appeal, the circuit court held for the government reversing a previous decision. An Oregon physician attempted to fulfill his scholarship service obligation in an area he, not the agency, selected. While

269. *In re Croley*, 121 B.R. 412 (Bankr. D.D.C. 1990).

270. Bankruptcy Code, 11 U.S.C.A. § 1325(a)(3).

271. *In re Smith*, 130 B.R. 102 (Bankr. D. Utah 1991).

272. *In re McKinney*, 118 B.R. 968 (Bankr. S.D. Ohio 1990).

273. *In re Selden*, 121 B.R. 59 (Bankr. D. Or. 1990).

274. *In re Key*, 128 B.R. 742 (Bankr. S.D. Ohio 1991).

275. *In re Tucker*, 130 B.R. 71 (Bankr. S.D. Iowa 1991).

276. *In re Livaditis*, 122 B.R. 330 (Bankr. N.D. Ill. 1990).

277. *In re Martin*, 119 B.R. 259 (Bankr. E.D. Okla. 1990).

278. *In re Lekowicz*, 119 B.R. 237 (Bankr. D. Colo. 1990).

279. *United States v. Hatcher*, 716 F. Supp. 447 (S.D. Cal. 1989), *aff'd*, 922 F.2d 1402 (9th Cir. 1991); see THE YEARBOOK OF EDUCATION LAW 1990 at 229; *United States v. Melendez*, 944 F.2d 216 (5th Cir. 1991).

280. *Buongiorno v. Sullivan*, 912 F.2d 504 (D.C. Cir. 1990).

denying his right to select his service obligation, the court remanded the case to determine whether his clinic for the homeless rendered collection of his service obligation unconscionable.²⁸¹

Using the Federal Trade Commission (FTC) rule on preservation of consumer defenses, students of an insolvent business college sought a rescission of their guaranteed student loans.²⁸² However, loans made under the Higher Education Act were exempt from the FTC rule.

Several cases involving the collection of defaulted guaranteed student loans were also before the courts. The Illinois Supreme Court held that an Illinois statute which provided for the commencement of action on delinquent or defaulted student loans exclusively in Cook County violated the due process right of meaningful access to the courts.²⁸³ In Oregon, a district court dismissed a claim of defamation and breach of contract since the statute of limitations was in effect.²⁸⁴ The New York Supreme Court, Appellate Division, reversed a decision in favor of the student because the statutory requirements relating to personal service by the guarantor in debt collection were not strictly followed.²⁸⁵ Also in New York, the court reversed a decision, once again in favor of the student, after finding that the statute of limitations was not tolled by the student's absence from the state.²⁸⁶ In Alabama, the commission on higher education met its burden to establish that a mother and student were cosigners of a guaranteed student loan which was in default.²⁸⁷ Another case which has been before the courts before²⁸⁸ was dismissed by the court of appeals in New York.²⁸⁹ The court declared that in order to avoid payment of a twenty-year-old educational loan debt, the former student abused the judicial process. An imposition of sanctions was granted to the sum of \$1,000 in order to pay previous court costs. In North Carolina, the court ruled in favor of a technical college which had dismissed a former instructor for failure to repay student loans.²⁹⁰

Child support and the requirement of parents to provide postminority support for college education to children of marriages terminated by divorce is an issue which has increased at a tremendous rate in litigation in the past few years. Several decisions indicated the willingness of the courts to modify child support by increasing the father's financial contribution for a college

281. *Rendleman v. Sullivan*, 760 F. Supp. 842 (D. Or. 1991).

282. *Veal v. First Am. Sav. Bank*, 914 F.2d 909 (7th Cir. 1990).

283. *Williams v. State Scholarship Comm'n*, 563 N.E.2d 465 (Ill. 1990).

284. *Thompson v. New York State Higher Educ. Servs. Corp.*, 751 F. Supp. 868 (D. Or. 1990).

285. *New York State Higher Educ. Servs. Corp. v. Palmeri*, 563 N.Y.S.2d 358 (App. Div. 1990).

286. *New York State Higher Educ. Servs. Corp. v. Bandler*, 564 N.Y.S.2d 211 (App. Div. 1990).

287. *Sims v. State ex rel. Ala. Comm'n on Higher Educ.*, 582 So. 2d 1137 (Ala. Civ. App. 1991).

288. See THE YEARBOOK OF EDUCATION LAW 1989 at 230, *Bell v. New York Higher Educ. Assistance Corp.*, 526 N.Y.S.2d 319 (Sup. Ct. 1987).

289. *Bell v. New York Higher Educ. Assistance Corp.*, 564 N.E.2d 664 (N.Y. 1990).

290. *Battle v. Nash Technical College*, 404 S.E.2d 703 (N.C. Ct. App. 1991).

education when appropriate.²⁹¹ There were cases, however, where the courts deemed it necessary to deny judgments changing child support. For example, in Florida, the court held that a father's choice to attend law school on nonscholarship funds in order to better himself financially could not be considered a voluntary reduction in income for child support purposes.²⁹² A court in Alabama refused to require payment of support for a college education of children who had reached the age of majority before the wife filed an application.²⁹³ The college expenses provision of a dissolution degree in a Missouri case was considered too vague to be enforced and the courts subsequently refused to find the father in contempt for failure to pay college expenses of one of his children.²⁹⁴ A court in Illinois held that a father could not recover postminority support already paid upon reversal of an earlier judgment.²⁹⁵ No "special circumstances" could be found by the court in New York to warrant an imposition of educational expenses incurred prior to the date of this petition.²⁹⁶ In Michigan, an advanced degree, obtained during marriage, was at issue during a divorce settlement.²⁹⁷ Compensation for unrewarded sacrifices, efforts, and contributions toward the attainment of the degree became part of the divisible marital assets. Other cases which dealt with these issues of child support for higher education should be noted.²⁹⁸

Student Organizations

A chapter of Psi Upsilon fraternity was sanctioned by a private Pennsylvania university following a hearing. Charges were brought by a nonmember of the fraternity who was mistakenly kidnapped and terrorized as part of a hazing process.²⁹⁹ The Superior Court of Pennsylvania affirmed a common pleas court decision that sanctions imposed against the fraternity chapter did

291. *In re Avitzur*, 570 N.Y.S.2d 860 (App. Div. 1991); *Bayliss v. Bayliss*, 575 So. 2d 1117 (Ala. Civ. App. 1990); *Devenuti v. Devenuti*, 566 N.Y.S.2d 349 (App. Div. 1991); *Gnirk v. Gnirk*, 589 A.2d 1008 (N.H. 1991); *In re McNeely*, 815 P.2d 1125 (Kan. Ct. App. 1991); *Napier v. Hutchinson*, 579 A.2d 981 (Pa. Super. Ct. 1990); *Solomon v. Findley*, 808 P.2d 294 (Ariz. 1991); *Still v. Still*, 405 S.E.2d 762 (Ga. Ct. App. 1991); *Stolk v. Stolk*, 574 N.E.2d 429 (Mass. App. Ct. 1991); *Weber v. Weber*, 804 S.W.2d 756 (Mo. Ct. App. 1990); *Zakarin v. Zakarin*, 565 So. 2d 790 (Fla. Dist. Ct. App. 1990).

292. *Milligan v. Addison*, 582 So. 2d 769 (Fla. Dist. Ct. App. 1991).

293. *Barnard v. Barnard*, 581 So. 2d 488 (Ala. Civ. App. 1990).

294. *LaFevers v. LaFevers*, 810 S.W.2d 369 (Mo. Ct. App. 1991).

295. *In re Pusey*, 811 P.2d 457 (Colo. Ct. App. 1991).

296. *Setford v. Cavanagh*, 572 N.Y.S.2d 591 (App. Div. 1991).

297. *Postema v. Postema*, 471 N.W.2d 912 (Mich. Ct. App. 1991).

298. *Barnett v. Burger*, 565 N.Y.S.2d 119 (App. Div. 1991); *Frank v. Frank*, 587 A.2d 340 (Pa. Super. Ct. 1991); *Thasher v. Wilburn*, 574 So. 2d 839 (Ala. Ct. Civ. App. 1990); *Maroney v. Maroney*, 570 N.Y.S.2d 339 (App. Div. 1991); *Monsky v. Sacks*, 588 A.2d 19 (Pa. Super. Ct. 1991); *Murrah v. Turnipseed*, 578 So. 2d 1340 (Ala. Civ. App. 1991); *Spitzer v. Tucker*, 591 A.2d 723 (Pa. Super. Ct. 1991); *Turner v. Turner*, 579 So. 2d 1381 (Ala. Civ. App. 1991); *Yarbough v. Motley*, 579 So. 2d 684 (Ala. Civ. App. 1991).

299. *Psi Upsilon of Philadelphia v. University of Pa.*, 591 A.2d 755 (Pa. Super. Ct. 1991).

not reach constitutional proportions mandating due process. At private universities, discipline is administered through procedural safeguards defined by the institution, and in this case, the courts found these procedures to be fundamentally fair.

Students at a New York state university challenged the imposition of a user fee for a university operated, intercampus bus service.³⁰⁰

First Amendment

Freedom of Speech. The initial case involving commercial speech in residence halls has had a protracted course of litigation (since 1986).³⁰¹ When the district court first ruled in 1986, it found that commercial speech could be limited to public areas and prohibited in dormitory rooms under the First Amendment. The circuit court of appeals reversed finding that students had a constitutional right to hear information in their rooms.³⁰² The Supreme Court ruled that the least restrictive prohibition of speech was not required of regulations concerning commercial speech and remanded the case.³⁰³ On remand the district court ruled that the case was now moot unless currently enrolled students joined the original complaint filed by students who were no longer enrolled in the university and who were no longer dormitory residents.³⁰⁴

The due process right to a hearing was at issue in a Texas civil rights case.³⁰⁵ A graduate student claimed he was ordered by God to minister to the Asian population on campus. An indecent exposure prompted his suit. Evaluation by a court psychiatrist found him to be incompetent, and the court ordered the appointment of a guardian *ad litem*. An appellate court reversed and remanded the decision because the student was not granted a hearing prior to the court's declaration of incompetency, and as a result, the student was denied due process.

Freedom of Association. A case involving a former midshipman who was terminated from the United States Naval Academy after admitting his homosexuality was back in the courts this year. A federal district court found that questions as to whether the plaintiff had been involved in homosexual conduct before or after he left the Naval Academy were relevant to the Academy's decision to reinstate and were not a violation of the plaintiff's

300. *Straight v. State Univ. of N.Y., at Buffalo*, 572 N.Y.S.2d 607 (Sup. Ct. 1990).

301. See THE YEARBOOK OF EDUCATION LAW 1988 at 254, *Fox v. Board of Trustees of State Univ. of N.Y.*, 649 F. Supp. 1393 (N.D.N.Y. 1986).

302. See THE YEARBOOK OF EDUCATION LAW 1989 at 233, *Fox v. Board of Trustees of State Univ. of N.Y.*, 841 F.2d 1207 (2d Cir. 1988).

303. See THE YEARBOOK OF EDUCATION LAW 1990 at 231, *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989).

304. *Fox v. Board of Trustees of State Univ. of N.Y.*, 764 F. Supp. 747 (N.D.N.Y. 1991).

305. *Thomas v. Humfield*, 916 F.2d 1032 (5th Cir. 1990).

Fifth Amendment rights.³⁰⁶ On appeal a federal circuit court found that the interrogations about homosexual conduct were outside the basis upon which he was dismissed.³⁰⁷ The midshipman was separated from the Academy because of his admission of homosexuality, but not for homosexual conduct. The lower court was in error in finding inquiry into his conduct relevant to the readmission decision.

There were three cases challenging the constitutionality of the use of student fees for various activities. In California, students at a public university claimed mandatory student fees violated their constitutional rights of association and speech and of the establishment clause.³⁰⁸ A California court found that the mandatory fees, authorized by board action, were constitutional since no political and religious organizations could receive funds and since association with the student government was voluntary.³⁰⁹ The Supreme Court of California remanded the case for reconsideration in light of *Keller v. State Bar of California*.³¹⁰

Another student fee case involved an Alabama student who charged university officials with unconstitutionally using student activity fees to pay for a speaker on abortion at a student sponsored lecture.³¹¹ A court of civil appeals affirmed an earlier decision finding that university officials did not violate free speech and association rights of the student who opposed abortion when they used student funds to pay for the event. The court claimed that even though the lecture may have been repugnant to the student, she was not in any way deprived of her right to express opposing opinions.

The last case of alleged improper use of student fees challenged the allocation of money to a public interest research group (PIRG). A federal district court held that a partial funding of a PIRG through a mandatory student activity fee "did not impermissibly infringe upon a student's First Amendment rights."³¹² In contrast to other PIRG cases,³¹³ the court found no close association between the PIRG and the student, (i.e., there was no risk of the student being compelled to support the PIRG's views).

306. See THE YEARBOOK OF EDUCATION LAW 1991 at 224, *Steffan v. Cheney*, 733 F. Supp. 115 (D.C. 1990); 733 F. Supp. 121 (D.C. 1990).

307. *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990).

308. See THE YEARBOOK OF EDUCATION LAW 1989 at 233, *Smith v. Regents of Univ. of Cal.*, 248 Cal. Rptr. 263 (Cl. App. 1988).

309. *Smith v. Regents of Univ. of Cal.*, 279 Cal. Rptr. 779 (Cal. 1991).

310. 110 S. Ct. 2228 (1990).

311. *Turner v. Sayers*, 575 So. 2d 1135 (Ala. Civ. App. 1991).

312. *Carroll v. Blinken*, 768 F. Supp. 1030 (S.D.N.Y. 1991).

313. *Golda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), cert. denied, 475 U.S. 1065 (1986).

Dismissal

The lead off case was heard by the Supreme Court of the United States.³¹⁴ At issue was a question of whether the college breached a contract with the plaintiff when she was terminated after failing to lose weight. The plaintiff signed an agreement to enroll in a weight loss program but failed to lose the agreed upon weight. The district court found for the plaintiff in her breach of contract claim and the federal appellate court affirmed.³¹⁵ The Supreme Court reversed the decision and remanded the case to the court of appeals for further hearings.³¹⁶ The appellate court had jurisdiction to review a district court ruling on state law.

Disciplinary Dismissal. This year, disciplinary cases dealt with cheating and academic dishonesty, dismissal due to drug offenses, prolonged harassment, and general misconduct in accordance to university regulations.

A female cadet was separated from the academy after a full honor investigative hearing panel determined that she had lied and cheated in violation of the Cadet Honor Code.³¹⁷ A federal district court ruled that the cadet must first exhaust all administrative remedies with the Army before pursuing the claim in civilian court.

An honors code violation and subsequent defamation suit were at issue in a Pennsylvania case.³¹⁸ The plaintiff, disciplined for an honor code violation during an examination, alleged that he was defamed by a false, scandalous, and malicious report by another student.³¹⁹ The court, however, affirmed that students' reports of violations of a college honor code to authorities were conditionally privileged and not libelous as defamation. In another case that involved cheating, the New York Appellate Court found substantial evidence supporting the college's claims of cheating on a final examination.³²⁰

The Fourth Amendment prohibiting indiscriminate search and seizure was the issue in a Virginia case.³²¹ A student at a private college in the commonwealth was convicted in the circuit court of marijuana possession with intent to distribute. Marijuana and drug paraphernalia were seized in the student's dormitory room after a university search following a burglary. The student alleged that his constitutional rights were violated, and filed a motion to suppress the evidence. The court, affirming the conviction and citing *United States v. Jacobsen*,³²² determined that Fourth Amendment guaran-

314. See THE YEARBOOK OF EDUCATION LAW 1988 at 258, *Russell v. Salve Regina College*, 649 F. Supp. 391 (D.R.I. 1986).

315. See also THE YEARBOOK OF EDUCATION LAW 1991 at 225, *Russell v. Salve Regina College*, 890 F.2d 484 (1st Cir. 1989).

316. *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991).

317. *Martin v. Stone*, 759 F. Supp. 19 (D.D.C. 1991).

318. *Vargo v. Hunt*, 581 A.2d 625 (Pa. Super. Ct. 1990).

319. *Id.* at 626.

320. *Abrahamian v. City Univ. of N.Y.*, 565 N.Y.S.2d 511 (App. Div. 1991).

321. *Duarte v. Commonwealth*, 407 S.E.2d 41 (Va. Ct. App. 1991).

322. 466 U.S. 109, 113 (1984).

tees did not apply to evidence obtained through an unreasonable search and seizure "effected by a private individual not acting as an agent of the government or with the participation or knowledge of any governmental official."³²³

An expelled graduate student in Illinois brought action against the university for breach of contract, alleging that the disciplinary committee was biased and prejudiced in conducting its proceedings.³²⁴ The student had engaged in a "systematic, prolonged and premeditated pattern of harassment" of another student in the graduate program. After a series of hearings, the disciplinary committee recommended that the student be expelled, the most severe sanction administered. The United States District Court rendered judgment for the university finding no evidence of prejudice or procedural error on the part of the disciplinary committee.

A Pennsylvania court vacated a lower court injunction that prevented a university from enforcing disciplinary actions against students cited for underage consumption of alcohol.³²⁵ The appeals court indicated that the lower court had exclusive jurisdiction to intercede in university disciplinary proceedings.

In Washington, a student athlete claimed a breach of contract against the university and the coach after his scholarship was not renewed following allegations of serious misconduct.³²⁶ The court of appeals affirmed in part the superior court decision that dismissed the complaint against the university for breach of contract since the scholarship contract was unambiguously a one-year award subject to additional renewals if all conditions were met. The student's continuous misconduct jeopardized that agreement. The court reversed, however, that part of the decision which stated that proper due process was not administered by the university.³²⁷

College students at a private institution in Maine who were members or pledges of an unauthorized fraternity sought legal and equitable relief under state law for disciplinary action administered by the college.³²⁸ The court denied the request under the Maine Civil Rights Act stating that the Act does not provide a remedy against private parties who interfere with the exercise of rights to free speech or association.

Academic Dismissal. Academic issues involved both undergraduate and graduate students: undergraduate students challenged grades, attendance policies, and student teaching; graduate students challenged dismissal from the program; and medical students challenged dismissal for various reasons. Two cases in adjudication in the past, were also back in court.

323. *Duarte v. Commonwealth*, 407 S.E.2d 41, 42 (Va. Ct. App. 1991).

324. *Holert v. University of Chicago*, 751 F. Supp. 1294 (N.D. Ill. 1990).

325. *East Stroudsburg Univ. v. Hubbard*, 591 A.2d 1181 (Pa. Commw. Ct. 1991).

326. *Conard v. University of Wash.*, 814 P.2d 1242 (Wash. Ct. App. 1991).

327. *Id.* at 1248.

328. *Phelps v. President & Trustees of Colby College*, 595 A.2d 403 (Me. 1991).

A community college student in Washington received a failing grade because of an alleged violation of the class attendance policy.³²⁹ A local court granted summary judgment to the institution finding no issues of material fact as to whether the grading procedures were administered properly. The state court of appeals reversed and remanded the case because issues were raised about the arbitrary and capricious application of the grading policies.

A failing grade in physics resulted in a challenge of the professor's grading policy under the Family Educational Rights and Privacy Act (FERPA). A federal circuit court of appeal, affirming a district court decision,³³⁰ found that FERPA did not give the student a right to bring an action challenging the grading process.³³¹ In Indiana, a student teacher alleged that her supervising faculty member of the university committed libel in writing a letter to a school administrator not recommending her for a full-time teaching position.³³² The court stated that the university had a qualified privilege to write the letter and that the privilege was not abused. It was also found that the letter did not constitute an educational record within the confines of the Educational Rights and Privacy Act, so did not violate federal law.³³³

In Louisiana, a nursing student at a technical college who was dismissed from the program for academic reasons, sought damages for wrongful termination as a student and breach of contract.³³⁴ The original petition was dismissed and the student appealed. The court of appeals affirmed the decision in part, stating that once an action was dismissed with prejudice it could not be filed again, thus dismissing her claim for monetary damages. The judgment dismissing the demand for reinstatement to the program, however, was reversed by the court and remanded to the district court for a hearing. On remand issues surrounding procedures used to suspend the student for three weeks, the alleged cause of academic failure, will be reviewed. A dismissed midwifery student at a state university in New York unsuccessfully sought an order requiring the Commissioner of Education to review her dismissal.³³⁵

Several cases involved graduate students working toward a doctorate but terminated before they could obtain their degree. In New York, a former doctoral candidate unsuccessfully claimed the academic "grading" of his thesis by his dissertation committee was arbitrary and capricious.³³⁶ A

329. *Ochsner v. Board of Trustees of Wash. Community College Dist. No. 17*, 811 P.2d 985 (Wash. Ct. App. 1991).

330. See THE YEARBOOK OF EDUCATION LAW 1991 at 225, *Tarka v. Cunningham*, 741 F. Supp. 1281 (W.D. Tex. 1990).

331. *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990).

332. *Olsson v. Indiana Univ. Bd. of Trustees*, 571 N.E.2d 585 (Ind. Ct. App. 1991).

333. *Id.* at 585.

334. *Ubosi v. Sowela Technical Inst.*, 584 So. 2d 340 (La. Ct. App. 1991).

335. *Verber v. Sobol*, 565 N.Y.S.2d 290 (App. Div. 1991).

336. *Aranoff v. Fordham Univ.*, 567 N.Y.S.2d 18 (App. Div. 1991).

candidate for the Ph.D. degree in the mathematics department of a state university in New York refused to take a preliminary examination, which had not been required since 1977, and was consequently dismissed from the program.³³⁷ The district court dismissed the complaint entirely and subsequently denied the student's "motion for reconsideration."³³⁸ On appeal, the court held that the "motion for reconsideration" had to be considered as a motion of relief from judgment thus prejudicing the student by the court's advancement of the date for the hearing.³³⁹ The case was remanded to the district court with specific directions for a rehearing.

There were cases of former doctoral students who claimed discrimination as the reason for their termination from a doctoral program. A dismissed physics student in Virginia alleged that his studies were terminated because of discrimination against him based on religion.³⁴⁰ Both the graduate student and his supervising professor were Muslim. The student, who was of the Shi'ite sect, claimed that his professor, who was of the Sunni sect, sabotaged his graduate studies because he refused to sign a petition asserting the correctness of the Sunni beliefs. The court of appeals affirmed the district court decision stating that the student was terminated from the graduate physics program for lack of research ability rather than religious discrimination. In New York, a former graduate student in the sociomedical sciences program of a private university claimed that she was terminated from her studies because she was afflicted with cerebral palsy.³⁴¹ The student was dismissed from the program by a consensus of the faculty after she twice failed her written qualifying examination in sociomedical sciences research methods. The district court found no evidence of discriminatory intent and granted a motion by the university to have the case dismissed.

A female doctoral student in the biomedical engineering program at a private New York institute alleged that sex discrimination, prevented her from completing the degree.³⁴² The court of appeals affirmed a decision that the student failed to a state cause of action under New York tort law. An Iranian doctoral student sought protection under the Fourteenth Amendment.³⁴³ The student was terminated from the electrical engineering program at a private university in Indiana for twice failing the doctoral examination. The student claimed that since he was enrolled in the program during the Iranian hostage crisis at the American Embassy in Tehran, the termination was due to purposeful and intentional acts of discrimination

337. *Branum v. Clark*, 927 F.2d 698 (2d Cir. 1991).

338. *Id.* at 699.

339. *Id.* at 706.

340. *Al-Zubaidi v. Ijaz*, 917 F.2d 1347 (4th Cir. 1990).

341. *Villanueva v. Columbia Univ.*, 746 F. Supp. 297 (S.D.N.Y. 1990).

342. *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759 (2d Cir. 1990).

343. *Kashani v. Purdue Univ.*, 763 F. Supp. 995 (N.D. Ind. 1991). See also *THE YEARBOOK OF EDUCATION LAW* 1988 at 257, *Kashani v. Purdue Univ.*, 813 F.2d 843 (7th Cir. 1987), cert. denied, 484 U.S. 846 (1987).

based on his membership in a particular class.³⁴⁴ On remand, the district court held that the student failed to establish civil rights violations in his termination from the program and that his reliance on the Iranian hostage crisis was merely an afterthought. The court acknowledged that the electrical engineering program at the university was demanding in the extreme and that "it is not for this court to rewrite the criteria for a doctorate in electrical engineering at Purdue University, and it is not for this court to superimpose its most limited and irrelevant scholastic and education judgments upon those of the educational officials. . . ."³⁴⁵

Four cases centered around former medical students who were dismissed from their programs. In New York, a black male of East Indian descent was suspended and eventually terminated from medical school after missing two final examinations and failing to complete other required assignments.³⁴⁶ Despite repeated opportunities to repeat the class and comply with all of the curriculum requirements, the student refused, alleging discrimination. The district court found no racial bias or arbitrary and capricious action in the academic decision.

An Iowa black medical student was terminated due to academic deficiency.³⁴⁷ The student claimed that his dismissal was arbitrary and capricious, motivated by racial bias, and totally unrelated to his academic performance. In rendering the judgment in favor of the university, the district court found that the school's decision to dismiss the student did not violate procedural or substantive due process.

In Pennsylvania, a former female medical student alleged that she had been fraudulently induced to enter into a settlement agreement concerning prior litigation against a state university.³⁴⁸ The student signed a settlement agreement with an understanding that she would be able to transfer to the medical school from Georgetown University but eventually found the transfer to be virtually impossible since she had difficulty in registering for the National Board of Examiners, a prerequisite for transfer. She was led to believe that her scores on the Medical Sciences Knowledge Profile (MSKP) would be substituted. The district court held that the student waived an attorney-client privilege with respect to representation conveyed to her during the settlement negotiations. The court, however, required the university to provide statistical information concerning transfers to and from the school as well as the examinations the transfer students had taken.³⁴⁹

The final academic dismissal case dealt with breach of contract. A resident at a medical college in Tennessee was refused a renewal of his

344. *Id.* at 998.

345. *Id.* at 997.

346. *Garg v. Albert Einstein College of Medicine of Yeshiva Univ.*, 747 F. Supp. 231 (S.D.N.Y. 1990).

347. *Nichols v. McDonald*, 751 F. Supp. 811 (S.D. Iowa 1990).

348. *Naglak v. Pennsylvania State Univ.*, 133 F.R.D. 18 (M.D. Pa. 1990).

349. *Id.* at 24-25.

contract for a fourth year after numerous negative evaluations.³⁵⁰ The court of appeals held that the medical resident had no contractual right to renewal or extension beyond the termination date, and thus sustained no compensable injury. It was also determined that the resident abandoned his procedural rights by failing to pursue an administrative review.

Other Constitutional Issues

In Georgia, senior residential coordinators brought a libel action against the university based on statements published in a student government newspaper alleging dereliction of duty and falsification of time cards.³⁵¹ The trial court dismissed the complaint for failure to state a claim, and the court of appeals dismissed all claims.

The Supreme Court of Ohio affirmed in part a case involving a state university student who sought to have statutes requiring selective service registration as a condition for in-state tuition rate and student loans declared unconstitutional.³⁵² The statute, requiring all male students at state-subsidized colleges and universities born after December 31, 1959 to file a certificate of registration with the selective service to be eligible for in-state tuition and financial aid, was challenged as unconstitutional and in violation of the equal protection clause of the Ohio Constitution. The student, who was opposed to a military draft, refused to file a certificate, and as a consequence was charged an out-of-state tuition surcharge and denied grants from the Ohio Student Loan Commission. The court of appeals found the statute to be constitutional in regard to the condition for student loan and scholarship, but unconstitutional regarding the reduced tuition. The supreme Court reversed the second part of the lower court decision finding that the entire statute, including tuition, was constitutional and in no way violated the state's equal protection clause.³⁵³

A case in Puerto Rico was back in the courts.³⁵⁴ In further litigation, a female surgery intern at a university medical school alleged sexual harassment and discrimination in violation of title IX of the Education Amendments of 1972.³⁵⁵ The female resident claimed that she was denied a fourth year residency appointment based on her gender. The district court granted the summary judgment motion of the university, which was entitled to

350. *Canady v. Meharry Medical College*, 811 S.W.2d 902 (Tenn. Ct. App. 1991).

351. *Williams v. Clark-Atlanta Univ. Inc.*, 406 S.E.2d 559 (Ga. Ct. App. 1991).

352. *Klepper v. Ohio Bd. of Regents*, 570 N.E.2d 1124 (Ohio 1991).

353. *Id.* at 1127.

354. See THE YEARBOOK OF EDUCATION LAW 1987 at 268, *Lipsett v. University of P.R.*, 637 F. Supp. 789 (D.P.R. 1986) *aff'd*, *Lipsett v. University of P.R.*, 864 F.2d 881 (1st Cir. 1988). See also THE YEARBOOK OF EDUCATION LAW 1991 at 212, *Lipsett v. University of P.R.*, 740 F. Supp. 921 (D.P.R. 1990).

355. *Lipsett v. University of P.R.*, 745 F. Supp. 793 (D.P.R. 1990).

Eleventh Amendment immunity from claims for damages. However, the claims for injunctive relief will be tried.³⁵⁶

The final case involved the NCAA and the constitutionality of its drug testing program.³⁵⁷ Student athletes at a private university in California alleged that the drug testing program violated their right of privacy in accordance to the California Constitution since the NCAA had not shown a compelling need to implement the program. The court of appeal affirmed an earlier decision permanently enjoining the NCAA from enforcing its drug testing program at the university. The court found that the California constitutional guarantee to privacy did extend to actions by the NCAA even though it is a private, voluntary association.³⁵⁸ A petition for review by the Supreme Court of California was granted.³⁵⁹

Liability

Personal Injury

Personal injury cases emanated from wrongful death or injury claims resulting from events involving alcohol consumption, occurrences on the campus, or off campus activities that were sponsored or sanctioned by the institution. Libel, slander, and procedural issues are also included in this section.

Death arising out of activities associated with an institution of higher education resulted in a number of cases. Wrongful death charges were brought by the parents of a community college student who drowned while taking a college sailing course.³⁶⁰ The plaintiffs were unable to circumvent the state's sovereign immunity protections by claiming that sailboats with a motor on them were a motor vehicle, an exception to the immunity provisions of that state. A number of cases were brought for wrongful death liability under either the Jones Act³⁶¹ or the Death on the High Seas Act.³⁶² A Rhode Island case, in which a crew member was electrocuted while on a research vessel owned by the United States but operated by the University of Rhode Island, resulted in a number of procedural motions. In one decision, the court found that the state's sovereign immunity superseded a claim under the Jones Act, but the Board of the University of Rhode Island was not an arm of the state,³⁶³ leaving material issues to be decided regarding immunity.³⁶⁴

356. *Id.* at 797.

357. *Hill v. National Collegiate Athletic Ass'n*, 273 Cal. Rptr. 402 (Ct. App. 1990).

358. *Id.* at 407.

359. *Hill v. NCAA*, 801 P.2d 1070 (Cal. 1990).

360. *Ozolins v. North Lake Community College*, 805 S.W.2d 614 (Tex. Ct. App. 1991).

361. 46 U.S.C.A. § 688 *et seq.*

362. 46 U.S.C.A. § 761 *et seq.*

363. *Rollins v. Board of Governors for Higher Educ.*, 761 F. Supp. 930 (D.R.I. 1990).

364. *Rollins v. Board of Governors for Higher Educ.*, 761 F. Supp. 933 (D.R.I. 1991).

Motions on the admissibility of evidence³⁶⁵ and the unavailability of punitive damages under the Jones Act³⁶⁶ were also issued as the litigation moved toward resolution. The Jones Act was also at issue when a fire caused the death of a cadet on a Massachusetts Maritime Academy training vessel.³⁶⁷ The court found that while the state was exempt from suit unless it consented under the Jones Act, it had consented through the state's Tort Claims Act to suits for damages up to \$100,000. Also, it was ruled that the question of whether the trainee was a seaman or employee under the Jones Act must be determined by a jury. When an Illinois university student was lost during a diving class on the high seas, the parents sued the institution and the professor for negligence.³⁶⁸ The court found that Eleventh Amendment immunity prohibited suit in federal court against either the university board or the professor as an employee of the university. Finally, another court awarded a summary judgment to a Hawaii university based on sovereign immunity in a captain's claim of emotional injury because the boat leased by the institution was in disrepair.³⁶⁹

Alcohol consumption was at issue in several personal injury cases. A California case involved a claim of university liability for the rape in a residence hall of a female student.³⁷⁰ The minor student had consumed alcohol at a party on her coed floor of the residence hall. After leaving the party intoxicated, she went to a male "friend's" room where the "friend's" brother forced her to go to an unlighted stairwell and raped her. She was later raped by other students back in the "friend's" room. The court found that the broken light in the stairwell was not a proximate cause of the rape and that the university was not liable either due to the male students' actions or for maintaining a coed floor. In Pennsylvania, the court found sovereign immunity protected a New Jersey state college from a suit by a Pennsylvania student who was injured in an auto accident after consuming alcohol at a college fraternity house.³⁷¹ In Washington, a university and an elevator company were not found liable when a dormitory student, while under the influence of alcohol, fell down an elevator shaft after stopping the elevator between floors by forcing open the inside elevator doors.³⁷²

Bodily injury or death claims emanated from incidents which took place on the college campus or resulted from official college activities. In Delaware, the court found that students, but not the college, were reckless enough to support the award of punitive damages for the death of another student in a dormitory fire.³⁷³ In California, an employee who was injured

365. *Rollins v. Board of Governors for Higher Educ.*, 761 F. Supp. 939 (D.R.I. 1991).

366. *Rollins v. Peterson Builders, Inc.*, 761 F. Supp. 943 (D.R.I. 1991).

367. *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991).

368. *Harvis v. Board of Trustees of Univ. of Ill.*, 744 F. Supp. 825 (N.D. Ill. 1990).

369. *Nelsen v. Research Corp. of the Univ. of Haw.*, 752 F. Supp. 350 (D. Haw. 1990).

370. *Tanja H. v. Regents of the Univ. of Cal.*, 278 Cal. Rptr. 918 (Ct. App. 1991).

371. *Rehberg v. Glassboro State College*, 745 F. Supp. 1113 (E.D. Pa. 1990).

372. *Houck v. University of Wash.*, 803 P.2d 47 (Wash. Ct. App. 1991).

373. *Stern v. Wesley College, Inc.*, 747 F. Supp. 263 (D. Del. 1990).

on her way to a class paid for as a fringe benefit by her employer, could not hold her employer vicariously liable under the going-and-coming rule.³⁷⁴ An Idaho court found that a professor's actions of walking up behind a person and, without consent, making piano finger motions on their back was not battery.³⁷⁵ However, the state supreme court found that the action alleged to have caused back injury was battery and remanded the case.³⁷⁶ A Wyoming court remanded a lower court grant of summary judgment to a professor in a case where it was alleged that he committed assault, battery, and inflicted emotional harm when he shouted and pounded on a student's desk.³⁷⁷ After another summary judgment grant to the professor, the state supreme court found issues existed as to whether the professor's actions were within the scope of his duties and again remanded the case.³⁷⁸

A student at a private university filed a personal injury suit because of lacerations on the arm from a broken shower soap dish.³⁷⁹ The female student and a male companion entered a residence hall shower just after it had been cleaned and while the janitor was still cleaning the dormitory restroom. The cleaning person maintained that the ceramic soap dish handle was not broken when the shower stall was cleaned, but the student maintained that it was broken when she entered the shower. The federal appellate court upheld a jury verdict in favor of the university and awarded the university double attorney fees for what the court termed an appeal with no basis.

Falls on campus resulted in a number of suits for bodily injury. An Illinois court found that the natural accumulation of ice and snow rule prevented a finding of negligence.³⁸⁰ A Pennsylvania private college was not negligent in providing walkways when a basketball fan departed from the sidewalk, which lead to the gymnasium, and fell while cutting across grass to another sidewalk which shortened the distance to the gym.³⁸¹ However, another court found that issues regarding adequate lighting of means of egress precluded summary judgment for the institute.³⁸² An insurers settlement of a slip and fall claim was not admission of coverage so as to preclude action to gain indemnification by the insurance company.³⁸³ An Idaho court found failure to file a notice of a claim was fatal to the plaintiff's claim emanating from a minor's fall from a gymnasium catwalk.³⁸⁴

374. *Blackman v. Great Am. First Sav.*, 284 Cal. Rptr. 491 (Ct. App. 1991).

375. See THE YEARBOOK OF EDUCATION LAW 1990 at 239, *White v. University of Idaho*, 768 P.2d 827 (Idaho Ct. App. 1989).

376. *White v. University of Idaho*, 797 P.2d 108 (Idaho 1990).

377. See THE YEARBOOK OF EDUCATION LAW 1991 at 228, *Jung-Leonczynska v. Steup*, 782 P.2d 578 (Wyo. 1989).

378. *Jung-Leonczynska v. Steup*, 803 P.2d 1358 (Wyo. 1990).

379. *Mattson v. Brown Univ.*, 925 F.2d 529 (1st Cir. 1991).

380. *Endsley v. Harrisburg Medical Center*, 568 N.E.2d 470 (Ill. App. Ct. 1991).

381. *Gilligan v. Villanova Univ.*, 584 A.2d 1005 (Pa. Super. Ct. 1991).

382. *Wider v. Rensselaer Polytechnic Inst.*, 572 N.Y.S.2d 795 (App. Div. 1991).

383. *Royal Ins. Co. of Am. v. State*, 564 N.Y.S.2d 982 (Ct. Cl. 1990).

384. *Banks v. University of Idaho*, 798 P.2d 452 (Idaho 1990).

Other personal injury cases resulted from a worker's injury while repairing a building ventilation system,³⁸⁵ injury resulting from an automobile accident while a basketball recruit was in transit from the airport to the institution,³⁸⁶ and an employee's injury when an elevator malfunctioned.³⁸⁷ In a case where an individual walked through a plate glass window, the court found that the individual was a licensee (a consultant for the institution), but even as an invited guest, was more negligent than the university in this matter.³⁸⁸ In a case where a Minnesota college rugby player suffered a broken neck at a Louisiana rugby tournament, the court granted summary judgment to the Louisiana college, tournament sponsor, and the Minnesota institution.³⁸⁹ However, on appeal the state supreme court found that issues existed as to the responsibility of the insurance company of the Minnesota college.³⁹⁰

Claims of libel were also litigated. In California, a libel claim brought by a rancher against a university surrounded allegations about the health of the rancher's cattle.³⁹¹ The court ruled that a jury award of compensatory damages could not be reversed based on the provisions of a settlement agreement. A question about a nurse's behavior in the operating room, which resulted in a doctor writing a letter to the hospital administrator demanding revocation of her surgery privileges, was malice, not qualified privilege.³⁹² However, statements made to a perspective employer about a previous employee's performance as a legislative lobbyist were opinion subject to qualified privilege.³⁹³ In California, a letter charged that racism and bigotry surrounded an administrator's action of cancelling the college's participation in an ethnic dinner. The court found that the letter was not defamation but was protected under the First Amendment.³⁹⁴

Several cases involved a breach of the patient-client relationship. Parents of a brain damaged child sued the university hospital and physicians when they failed to make the proper notations about a hip that was later found to be broken and continued to force the patient to sit up in a wheelchair.³⁹⁵ The court on appeal found that failure to make proper notations constituted

385. *Krieger v. Trane Co.*, 765 F. Supp. 756 (D.D.C. 1991).

386. *Foster v. Board of Trustees of Butler County Community College*, 771 F. Supp. 1122 (D. Kan. 1991).

387. *Cooper v. State*, 569 N.Y.S.2d 889 (Cl. Ct. 1991).

388. *Doelker v. Ohio State Univ.*, 573 N.E.2d 809 (Ohio Ct. Cl. 1990).

389. See *THE YEARBOOK OF EDUCATION LAW 1991* at 228, *Fox v. Board of Supervisors*, 559 So. 2d 850 (La. Ct. App. 1990).

390. *Fox v. Board of Supervisors of La. State Univ.*, 576 So. 2d 978 (La. 1991).

391. *Neary v. Regents of Univ. of Cal.*, 810 P.2d 997 (Cal. 1991).

392. *Watson v. McClelland*, 563 N.Y.S.2d 400 (App. Div. 1990).

393. *Hunt v. University of Minn.*, 465 N.W.2d 88 (Minn. Ct. App. 1991).

394. *Kimura v. Superior Court*, 281 Cal. Rptr. 691 (Ct. App. 1991).

395. *University of Tex. Medical Branch at Galveston v. York*, 808 S.W.2d 106 (Tex. Ct. App. 1991).

negligence under the Tort Claims Act. A Minnesota court found it lacked jurisdiction over a suit against a dentist and a Louisiana university.³⁹⁶

An employee of a state agency injured when an office partition collapsed, sued both her employer and the third party manufacturer of the partition. The state agency was found to be subject to suit in New York Court of Claims since it was not a corporation separate from the state.³⁹⁷ In another case involving medical treatment for a child who was severely ill with malaria, the court found that the statute of limitations had expired. The doctors decided to use a drug which controls irregular heartbeat, but was not yet approved for the treatment of malaria, when the approved drug was unavailable. The plaintiff sued for a breach of the doctor-patient relationship because, without divulging the identity of the patient, the doctors published the successful results of the treatment in several renowned medical journals.³⁹⁸

Several cases of rape involved the admissibility of evidence. In one case, the court found that when the rape victim agreed to be subjected to an examination by a physician, she waived any privilege and must grant access to the examinations by other physicians.³⁹⁹ In another rape case, the court found that interrogatories about a female student's virginity, sexual history, or abortions were not material to the male's claim of defamation.⁴⁰⁰

Workers' Compensation

The certification of the legitimate employer was before the court in several cases. A Colorado court found that a university was not the statutory employer of an employee of a firm with which the institution had a contract.⁴⁰¹ However, employees of a university sponsored national laboratory were statutory employees of the university and as such were eligible for unemployment compensation.⁴⁰² Michigan nurses, dismissed after they had failed the state licensing exam, were eligible for unemployment compensation.⁴⁰³

What was considered "appropriate payments" for injured workers eligible under the Workers Compensation Act was also litigated. A Georgia court found that cleaning services for the home, necessitated by the injury, were awardable compensation under the Act.⁴⁰⁴ A Florida graduate student employee's award for exposure to toxic fumes in the laboratory could not

396. *Stainbrook v. Kent*, 771 F. Supp. 988 (D. Minn. 1991).

397. *Bulson v. Control Data Corp.*, 563 N.Y.S.2d 249 (App. Div. 1990).

398. *Osei-Afryie v. Medical College of Pa.*, 937 F.2d 876 (3d Cir. 1991).

399. *State ex rel. Wash. Univ. v. Gallagher*, 797 S.W.2d 726 (Mo. Ct. App. 1990).

400. *Greene v. Aberle*, 568 N.Y.S.2d 300 (Sup. Ct. 1991).

401. *University of Colo. v. Graham*, 807 P.2d 1204 (Colo. Ct. App. 1990).

402. *Quintana v. University of Cal.*, 808 P.2d 964 (N.M. Ct. App. 1991).

403. *Clark v. North Detroit Gen. Hosp.*, 470 N.W.2d 393 (Mich. 1991).

404. *Berry College, Inc. v. Storey*, 404 S.E.2d 640 (Ga. Ct. App. 1991).

include scholarship money awarded for academic excellence.⁴⁰⁵ The calculation of the salary used to determine compensation should not include the scholarship. In another case a North Carolina appeals court ruled that the payment of sick leave and vacation benefits by the employer could not be subtracted from the compensation award paid to the employee.⁴⁰⁶

Certifiable injuries were sustained when an office worker was exposed to air-conditioning fumes, which damaged her immune system and made her unable to work.⁴⁰⁷ The court also noted that the worker gave timely notice as soon as she discovered the origins of the illness. However, a Florida court denied a worker's claim for compensation resulting from work-related stress that induced aggravation of multiple sclerosis.⁴⁰⁸ An employee, injured during a postconference sightseeing tour, was not eligible for compensation for a nonwork related injury.⁴⁰⁹

An Oklahoma court found that material issues, regarding whether an employee who filed a compensation claim was retaliated against through termination, precluded a summary judgment motion.⁴¹⁰ An Illinois court found that an attorney was entitled to fees when he successfully recouped the payment of a death benefit for the Committee of the State University Retirement System.⁴¹¹

Strict or Product Liability

Several cases involved product liability surrounding the installation of asbestos in campus buildings. The New Hampshire university system attempted to recover asbestos removal costs from the asbestos manufacturers. While issues are still pending, the institution was unable to recover from all manufacturers based on the doctrines of market share, and alternative and enterprise liability.⁴¹² In another asbestos case, a New York county court found that strict liability negligence claims were appropriately dismissed because they had previously been dismissed in another county court.⁴¹³

405. *University of Miami Medical Sch. v. Singleton*, 582 So. 2d 1182 (Fla. Dist. Ct. App. 1990).

406. *Estes v. North Carolina State Univ.*, 401 S.E.2d 384 (N.C. Ct. App. 1991); see also *THE YEARBOOK OF EDUCATION LAW 1989* at 242, *Estes v. North Carolina State Univ.*, 365 S.E.2d 160 (N.C. Ct. App. 1988).

407. *Temple Univ. v. Workmen's Compensation Appeal Bd., Insurance Co. of N. Am.*, 588 A.2d 63 (Pa. Commw. Ct. 1991).

408. *Massie v. University of Fla.*, 570 So. 2d 963 (Fla. Dist. Ct. App. 1990), *juris. granted*, 576 So. 2d 294 (Fla. 1991).

409. *Marbury v. Industrial Comm'n*, 577 N.E.2d 672 (Ohio Ct. App. 1989).

410. *Keeter v. State ex rel. Okla. State Univ.*, 800 P.2d 1071 (Okla. Ct. App. 1990).

411. *Taylor v. State Univs. Retirement Sys.*, 560 N.E.2d 893 (Ill. App. Ct. 1990).

412. *University Sys. of N.H. v. United States Gypsum Co.*, 756 F. Supp. 640 (D.N.H. 1991).

413. *Brooklyn Law Sch. v. Raybon, Inc.*, 572 N.Y.S.2d 312 (App. Div. 1991).

Contract Liability

For purposes of the Office of Federal Contract Compliance, the court was asked to determine whether the North Carolina System of Higher Education was a single, unified state agency, requiring that all the campuses achieve compliance when one campus has a federal contract. The federal district court decision that it was not a single, unified agency for compliance purposes was reversed and remanded on appeal.⁴¹⁴

Contract liability on an investment banking agreement between a private college and an investment corporation expired when the agreement expired.⁴¹⁵ In the sale of a yacht, the court found that a purchase agreement had been breached when the buyer wrote "charitable donation" on a check, which was partial payment for the boat, after being told that money could not be accounted for by a charitable donation. The check was returned by the seller and never reissued by the buyer.⁴¹⁶ Fraud and theft charges were also filed.

An Army Reserve enlistee sued for a breach of contract when he was called to active service in the Persian Gulf.⁴¹⁷ The enlistee unsuccessfully claimed that he was fraudulently led to believe that he would never have to serve on active duty. Furthermore, the court found that questions regarding his physical ability to serve on active duty should be addressed by the military justice system.

In another breach of contract claim, an Indiana institution alleged that the contractor was responsible for the deterioration of the brickwork on a building. This was an appeal of a federal district court ruling that found that the contractor had not breached the construction contract. The appellate court affirmed the decision, finding that the district court did not err when it chose to rely on the theories of one expert as to the reason for the deterioration over the opinion of the institution's expert.⁴¹⁸ In a Missouri case, the court found that the leasee breached a lease agreement with a university by failing to make repairs on the premises.⁴¹⁹

A sub subcontractor, who worked on a contract awarded by the state building authority for the University of Michigan, sought claim to the funds from the contractor's posted bond after the contractor filed for bankruptcy. The court found that a Michigan university established by the state's constitution did not come under the bonding authority statute and that the sub subcontractor had no bonding claim against the contractor.⁴²⁰ The buyer of

414. See THE YEARBOOK OF EDUCATION LAW 1991 at 193, Board of Governors of Univ. of N.C. v. United States Dep't of Labor, 722 F. Supp. 1301 (E.D.N.C. 1989), *rev'd*, 917 F.2d 812 (4th Cir. 1990).

415. Liberty Univ. Inc. v. Kemper Secs. Group, Inc., 758 F. Supp. 1148 (W.D. Va. 1991).

416. Palm Beach Atl. College Inc. v. First United Fund, Ltd., 928 F.2d 1538 (11th Cir. 1991).

417. Rodriguez v. Vuono, 757 F. Supp. 141 (D.P.R. 1991).

418. Trustees of Ind. Univ. v. Aetna Casualty and Sur. Co., 920 F.2d 429 (7th Cir. 1990).

419. Washington Univ. v. Royal Crown Bottling Co. of St. Louis, 801 S.W.2d 458 (Mo. Ct. App. 1990).

420. Dynamic Heating & Pumping Co. v. Insurance Co. of N. Am., 912 F.2d 123 (6th Cir. 1990).

a beauty college unsuccessfully brought a breach of agreement claim against the seller when the seller opened a beauty salon allegedly in violation of a covenant not to compete.⁴²¹ A claim against a rental company who cross claimed against a community college was before the court.⁴²² The court found that the employee did not have authority to enter into an indemnity agreement for the college and paying the rental bill did not constitute acceptance by the college of the agreement.

On remand from the United States Supreme Court,⁴²³ a federal circuit court affirmed a breach of contract claim.⁴²⁴ The court found that the doctrine of substantial performance was correctly applied to the student. The student performed the contract by enrolling in a weight loss program but failed to lose the agreed upon weight.

Insurance contracts were brought before the bench on issues surrounding coverage and indemnification. In one case involving the question of indemnification of the university by the insurer, questions remained as to how much of the settlement agreement was for damages and how much was for attorney fees.⁴²⁵ Similarly, summary judgment motions were denied where questions existed as to the scope of coverage available to a general contractor of a university construction project;⁴²⁶ and where a question of whether a student's full-time enrollment rendered her a dependent of the employee, and therefore covered by the employer's insurance policy.⁴²⁷ An Illinois university coverage of \$5 million in each of two six-month periods did not give it an aggregate annual coverage of \$10 million.⁴²⁸ In Massachusetts, the court on remand⁴²⁹ found that reckless disregard for the Age Discrimination Act was not the same as deliberate or intentional wrongdoing so as to remove rights to indemnification.⁴³⁰ An insurance policy in Illinois covered the medical school dean in an antitrust claim.⁴³¹ In another case involving allegations of arson, circumstantial evidence could not be used to justify denial of coverage.⁴³² In Louisiana, students who volunteered to pick up items for the school were covered by the school's insurance when they had an automobile accident while on the errand.⁴³³

421. *Riddick v. Suncoast Beauty College, Inc.*, 579 So. 2d 855 (Fla. Dist. Ct. App. 1991).

422. *Lovering v. Beaudette*, 572 N.E. 2d 591 (Mass. App. Ct. 1991).

423. *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991).

424. *Russell v. Salve Regina College*, 938 F.2d 315 (1st Cir. 1991).

425. *Continental Casualty Co. v. Canadian Universal Ins. Co.*, 924 F.2d 370 (1st Cir. 1991).

426. *Sea Crest Constr. Corp. v. Centennial Ins. Co.*, 572 N.Y.S. 2d 504 (App. Div. 1991).

427. *Thomas v. Principal Fin. Group*, 566 So. 2d 735 (Ala. 1990).

428. *Board of Trustees of Univ. of Ill. v. Insurance Corp. of Ir., Ltd.*, 750 F. Supp. 1375 (N.D. Ill. 1990).

429. See THE YEARBOOK OF EDUCATION LAW 1991 at 200, *Andover Newton Sch. Inc. v. Continental Casualty Co.*, 901 F.2d 1 (1st Cir. 1990).

430. *Andover Newton Sch. Inc. v. Continental Casualty Co.*, 566 N.E. 2d 1117 (Mass. 1991).

431. *Board of Trustees of Univ. of Ill. v. Insurance Corp. of Ir., Ltd.*, 747 F. Supp. 1260 (N.D. Ill. 1989), *aff'd*, *Insurance Corp. of Ir. v. Board of Trustees of S. Ill. Univ.*, 937 F.2d 331 (7th Cir. 1991).

432. *St. Paul Fire & Marine v. Salvador Beauty College*, 930 F.2d 1329 (8th Cir. 1991).

433. *Schroeder v. Board of Supervisors of La. State Univ.*, 577 So. 2d 1074 (La. Ct. App. 1991).

A number of cases involved construction bidding procedures. A bidder's due process was violated when the institution failed to notify them of a reconsideration of "responsibility" of the low bidder and another company.⁴³⁴ An institution had not changed the bid specifications when it changed the way it would evaluate the bids received.⁴³⁵ A bid specification that required that the contractor demonstrate past restoration experience and the ability to restore an historic building was within allowable criteria under state statutes.⁴³⁶

An Iowa court ruled that it was not bad faith for the university to expect to renegotiate the price of coal with a coal supplier.⁴³⁷ In Missouri, the court found that the completion of the contract rendered moot a complaint of failure to follow the normal bidding procedures.⁴³⁸ An Ohio court resolved a controversy over the amount of damages the contractor and the university should each bear in a case where the contract was not completed on time and culpability could be placed with both parties.⁴³⁹

Deceptive Practices

An attorney was not found to have interfered with a contractual relationship when he contacted students enrolled in a proprietary school program to gain testimony about fraudulent school practices.⁴⁴⁰ In another case, a state supreme court reversed a summary judgment decision to an institution on plaintiff's fraud claim over institutional assurance that credits taken at the college would transfer to public and private colleges located in the area.⁴⁴¹ A New York appellate court affirmed a lower court denial of a motion to dismiss.⁴⁴² A plaintiff brought a claim against a proprietary school and the state's department of education for failure to police the school's deceptive admissions and recruitment practices.

Negligence

Negligence cases result from claims that the institution or groups failed to take due care in the maintenance of the campus and supervision of students. Several cases involve death by drowning in an institution's

434. Professional Sec. Bureau, Ltd. v. City Univ. of N.Y., 573 N.Y.S.2d 209 (Sup. Ct. 1991).

435. IMSC Sys., Inc. v. City of N.Y., 566 N.Y.S.2d 8 (App. Div. 1991).

436. Construction Contractors Ass'n of the Hudson Valley, Inc. v. Board of Trustees, Orange Community College, 565 N.Y.S.2d 997 (Sup. Ct. 1991).

437. Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859 (Iowa 1991).

438. Dicarilo Constr. Co. v. Junior College Dist. of Metro. Kan. City, 813 S.W.2d 312 (Mo. Ct. App. 1990).

439. Scheider-Dietrich, Inc. v. Bowling Green State Univ., 573 N.E.2d 798 (Ohio Ct. Cl. 1989).

440. Brown Mackie College v. Graham, 768 F. Supp. 1457 (D. Kan. 1991).

441. Owens v. Huffstetler College, 567 So. 2d 1231 (Ala. 1990).

442. Figueroa v. Market Training Inst., Inc., 562 N.Y.S.2d 175 (App. Div. 1990).

swimming pool. In one case, the court found that neither the university nor the professor who authorized use of the pool were negligent.⁴⁴³ However, the jury finding of negligence on the part of the lifeguard was based on proper evidence. In another case, a seminary and a supervising priest were found negligent in the drowning of an altar boy who was swimming with a church group at the seminary pool.⁴⁴⁴

A number of cases involved questions of institutional negligence when individuals slipped and fell on the campus. A New York university was held 80% negligent when it failed to provide adequate lighting on a stairwell where a theater goer was injured.⁴⁴⁵ However, another New York court found that an institution could not be held liable for a defective walkway on property it had sold three weeks prior to the accident.⁴⁴⁶ An Ohio university was not found to be negligent nor was the claimed negligence the proximate cause of the student's injury when she fell in a classroom building.⁴⁴⁷ Finally, an institution was not negligent in failing to see or anticipate the hairline cracks in a cement stairway which were the proximate cause of the falling injury to a student.⁴⁴⁸

Several cases involved negligence at a university hospital. A New York court found that the hospital and physician were negligent in withdrawing prescription medication from a seventy-six year old chemically dependent patient with chronic back pain.⁴⁴⁹ Another case involved claims of negligence in the use of x-rays on a woman prior to a diagnosis of pregnancy.⁴⁵⁰

A local fraternity, but not the national organization or the university, was found negligent when an active member poured oven cleaner on the neck and shoulders of a pledge during initiation week.⁴⁵¹ On appeal a Florida court found that a community college was not immune from a claim by a rape victim that the institution failed to maintain adequate security on campus.⁴⁵² However, a Georgia court found that sovereign immunity blocked the negligence claim of a pedestrian injured on a public college campus.⁴⁵³

The injured party's contribution to the negligence resulted in plaintiffs' loss in a number of cases. In one case, a fraternity member who was a minor consumed alcohol at the fraternity and later dove off an eight-foot wall onto a waterslide and was rendered quadriplegic. The court affirmed the jury

443. *Walker v. Daniels*, 407 S.E.2d 70 (Ga. Ct. App. 1991).

444. *Xivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 580 A.2d 1341 (Pa. Super. Ct. 1990).

445. *Rothstein v. City Univ. of N.Y.*, 562 N.Y.S.2d 340 (Ct. Cl. 1990).

446. *Casteneda v. Rubell*, 566 N.Y.S.2d 222 (App. Div. 1991).

447. *Anderson v. Cleveland State Univ.*, 577 N.E.2d 147 (Ohio Ct. Cl. 1988).

448. *De Luke v. State*, 564 N.Y.S.2d 635 (App. Div. 1991).

449. *Berger v. State*, 567 N.Y.S.2d 275 (App. Div. 1991).

450. *Jones v. Howard Univ., Inc.*, 589 A.2d 419 (D.C. 1991).

451. *Furek v. University of Del.*, 594 A.2d 506 (Del. Super. Ct. 1991).

452. *District Bd. of Trustees of Miami Dade Community College v. M.H.*, 578 So. 2d 8 (Fla. Dist. Ct. App. 1991).

453. *Pollard v. Board of Regents of Univ. Sys. of Ga.*, 401 S.E.2d 272 (Ga. 1991).

finding that neither the fraternity, the university, nor the alcohol distributing company were negligent but rather the plaintiff was negligent.⁴⁵⁴ In a Wisconsin case, the court found that the student was negligent by pushing open the inside elevator doors and pushing a safety switch that caused the elevator to drop seven floors. As the student climbed out of the "express" elevator which had stopped between floors, he was trapped and injured.⁴⁵⁵ An Ohio student was negligent when he failed to follow the safety instructions in operating a table saw in a theater shop and was injured.⁴⁵⁶

Medical Malpractice

Medical malpractice claims were also before the courts. A dental school's agreement releasing the school, physicians, and student trainees from liability was void.⁴⁵⁷ In another case issues of the statute of limitations began to toll when parents became aware that negligent prenatal care might be the cause of their child's brain damage.⁴⁵⁸ The improper notification of depositions resulted in a new trial order in a wrongful death charge against a physician and a university hospital.⁴⁵⁹ In another malpractice case, an attending neurosurgeon could not be held 100% negligent for the acts of a resident physician under his supervision.⁴⁶⁰ Death after brain surgery was not caused by the actions of an electrocorticographer nor did articles in a medical journal describing actions that could be used, but were not, establish a standard of care in these procedures.⁴⁶¹ A malpractice claim against a physician and a product liability claim against a drug manufacturer were time barred.⁴⁶²

Antitrust

Suits under the Sherman Antitrust Act⁴⁶³ were brought in a number of cases. A Nurses' Midwifery Association sued a university hospital for refusing to allow them to practice their trade in the hospital.⁴⁶⁴ The court found that the plaintiffs failed to show that certain groups conspired to deny them the practice of their trade. However, questions remained as to the conspiracy of a physicians' association and the case was remanded in part.

454. *Foster v. Purdue Univ. Chapter, Beta Mu of Beta Theta Pi*, 567 N.E. 2d 865 (Ind. Ct. App. 1991).

455. *Johnson v. Grzadzilewski*, 465 N.W. 2d 503 (Wis. Ct. App. 1990).

456. *Richmond v. Ohio State Univ.*, 564 N.E. 2d 1145 (Ohio Ct. Cl. 1989).

457. *Ash v. New York Univ. Dental Center*, 564 N.Y.S. 2d 308 (App. Div. 1990).

458. *Menendez v. Public Health Trust of Dade County*, 566 So. 2d 279 (Fla. Dist. Ct. App. 1990).

459. *Turner v. Duke Univ.*, 399 S.E. 2d 402 (N.C. Ct. App. 1991).

460. *Parmelee v. Kline*, 579 So. 2d 1008 (La. Ct. App. 1991).

461. *Upton v. Baylor College of Medicine*, 811 S.W. 2d 168 (Tex. Ct. App. 1991).

462. *University of Miami v. Bogorff*, 583 So. 2d 1000 (Fla. 1991).

463. 15 U.S.C.A. § 1.

464. *Nurse Midwifery Ass'n v. Hibbett*, 918 F.2d 605 (6th Cir. 1990).

In another case, a student brought an antitrust suit against the Ivy League for price fixing of tuition and financial aid. A motion to remove the case to another jurisdiction was denied.⁴⁶⁵ Finally, a football player, who competed unsuccessfully in the professional football draft, sued to regain his eligibility to play college football. The plaintiff failed to show that the removal of his remaining eligibility was a violation of the antitrust laws.⁴⁶⁶

Copyright Law

The Medical College Admissions Test (MCAT) sued for injunctive relief from a New York law that required the public release of the test questions. The court issued a temporary injunction pending final resolution of the case because the law had a potential effect on the market value of the exam.⁴⁶⁷ In another New York case, an educational institution brought a claim of copyright infringement against a professor and a book publisher. The court found that copied materials did not constitute protected expression under the copyright laws.⁴⁶⁸ However, another court found that issues existed as to whether an implied contract assigned the rights to market a photoaged skin invention to the university.⁴⁶⁹ Finally, publishers brought copyright infringement charges against a photocopy company.⁴⁷⁰ The court found that the copying of publisher's materials without permission was a copyright infringement and awarded damages to the publisher.

Estates and Wills

Cases also involved disputes over the ownership of estates and the probate of wills. For example, a court held that a joint will of a husband and a wife could not be revoked by the husband after the wife's death.⁴⁷¹ In another case, the court held that certificates of deposit were "remaining cash and bonds" bequeathed in the will to the university.⁴⁷² Another case set up a trust for scholarships.⁴⁷³ Finally, a college, which had gone bankrupt, could not claim it continued to exist to prevent money from an estate from reverting to another trust.⁴⁷⁴

465. *Kingssepp v. Wesleyan Univ.*, 763 F. Supp. 22 (S.D.N.Y. 1991).

466. *Banks v. University of Idaho*, 798 P.2d 452 (Idaho 1990).

467. *Association of Am. Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991).

468. *Arca Institute, Inc. v. Palmer*, 761 F. Supp. 1056 (S.D.N.Y. 1991).

469. *University Patents, Inc. v. Kligman*, 762 F. Supp. 1212 (E.D. Pa. 1991).

470. *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991).

471. *Concordia College v. Salvation Army*, 470 N.W.2d 542 (Minn. Ct. App. 1991).

472. *Barnes v. Evans*, 402 S.E.2d 164 (N.C. Ct. App. 1991).

473. *In re Casey*, 564 N.Y.S.2d 669 (Sup. Ct. 1990).

474. *Bennett College v. United Bank of Denver*, 799 P.2d 364 (Colo. 1990).

Several cases involved the ownership of university benefits. In one case, the court found that the community property agreement of the divorce settlement, not the designation of beneficiaries, determined the disposition of a retirement annuity.⁴⁷⁵ A summary judgment was denied on the disposition of a former wife's rights to an annuity death benefit of her deceased former husband.⁴⁷⁶

475. *Harris v. Harris*, 804 P.2d 1277 (Wash. Ct. App. 1991).

476. *Doyle v. Sullivan*, 566 N.Y.S.2d 997 (Sup. Ct. 1991).

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